SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 329

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE EIGHTEENTH DISTRICT OF OHIO, PETITIONER

vs.

WILLARD STORAGE BATTERY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 [Caption omitted.]

2 In United States District Court, Northern District of Ohio, Eastern Division

No. 15,761, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

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No. 15,762, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

No. 15,763, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

No. 15,764, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

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No. 15,765, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

3 *Petition*

Filed May 31, 1929, in no. 15761

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn,

collector of internal revenue of the United States for the 18th District of Ohio, to recover the sum of $89,195.36, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to September 1, 1922, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about September 1, 1922, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the Eighteenth District of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the Northern District of Ohio, Eastern Division.

3. Prior to September 1, 1922, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on September 1, 1922, and ending on December 31, 1922, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made in accordance with the requirements, and upon the demand of, the defendant, made a return in accordance with the provisions of

4 title IX, section 900 of the United States Revenue Act of 1921, of the computation of manufacturer's excise taxes at the rate of five (5) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of five (5) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A" and made part hereof, and is sub-

mitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B" and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in "Exhibit B", which said sums of money amounted in the aggregate to the sum of $89,195.36, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in "Exhibit B." All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between September 1, 1922, and December 31, 1922, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motorcycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motorboats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, turrent lighting and auxiliary

power, signalling devices in railroad systems and in military service, searchlights, telephone service, isolated lighting and power plants, street railways, fire alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning September 1, 1922, and ending on December 31, 1922, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title IX, section 900 of the United States Revenue Act of 1921, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said sales the sum of $89,195.36 as set forth in "Exhibit B" hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant, and represented the payment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes herebefore set forth were paid by the plaintiff upon the demand of the defendant and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1922, and ending on December 31, 1922, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The plaintiff is informed that as to the taxes paid by it prior to October 5, 1922, its claim for refund was barred by the statute of limitations, and therefore makes no claim in this suit for taxes illegally and erroneously collected from it by the defendant prior to October 5, 1922. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F" and made part hereof.

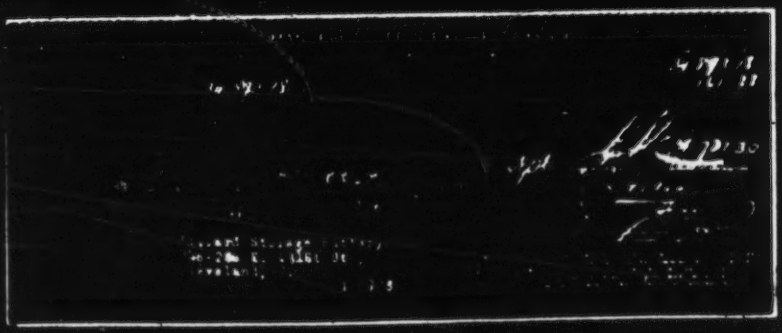
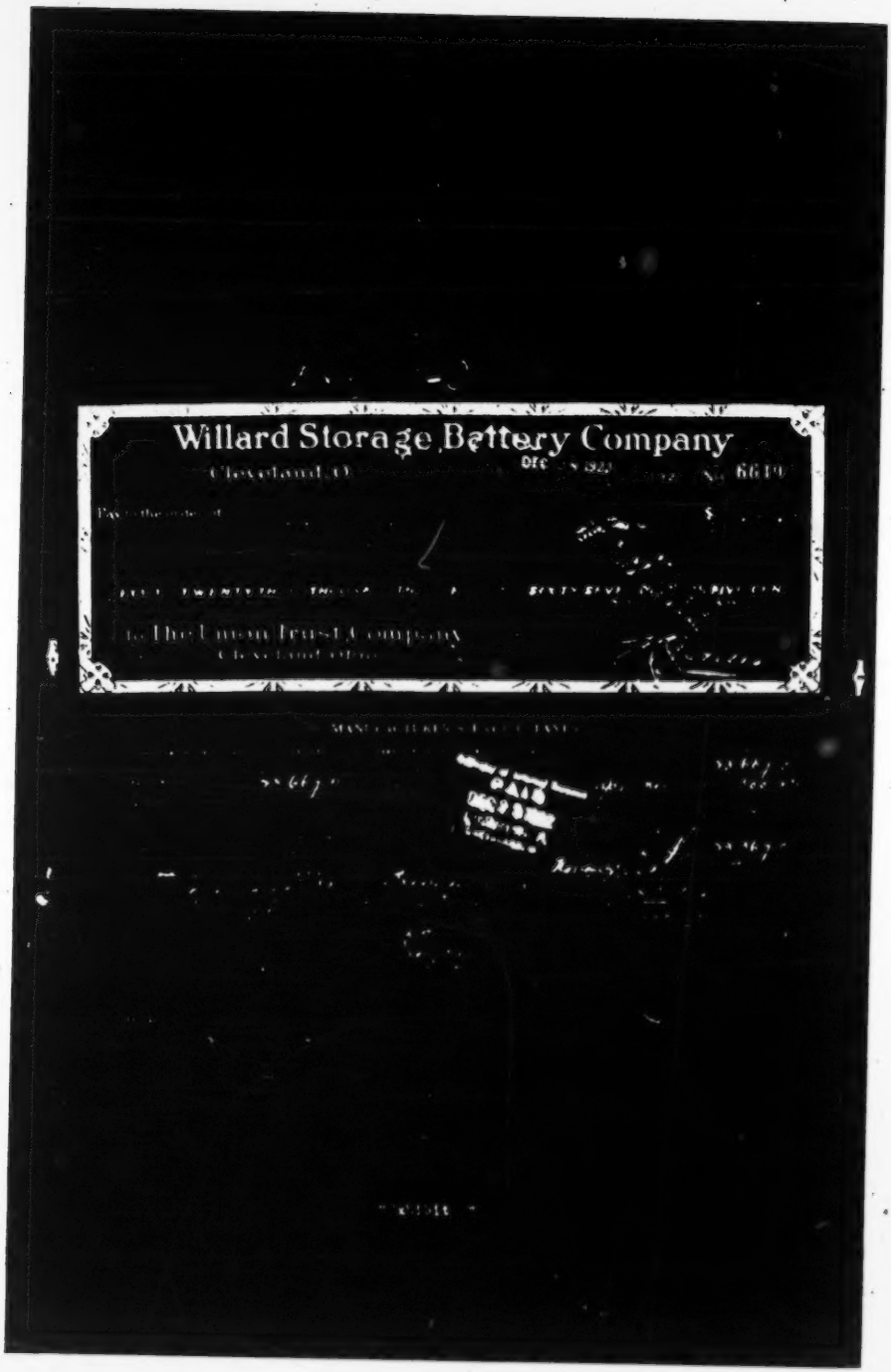
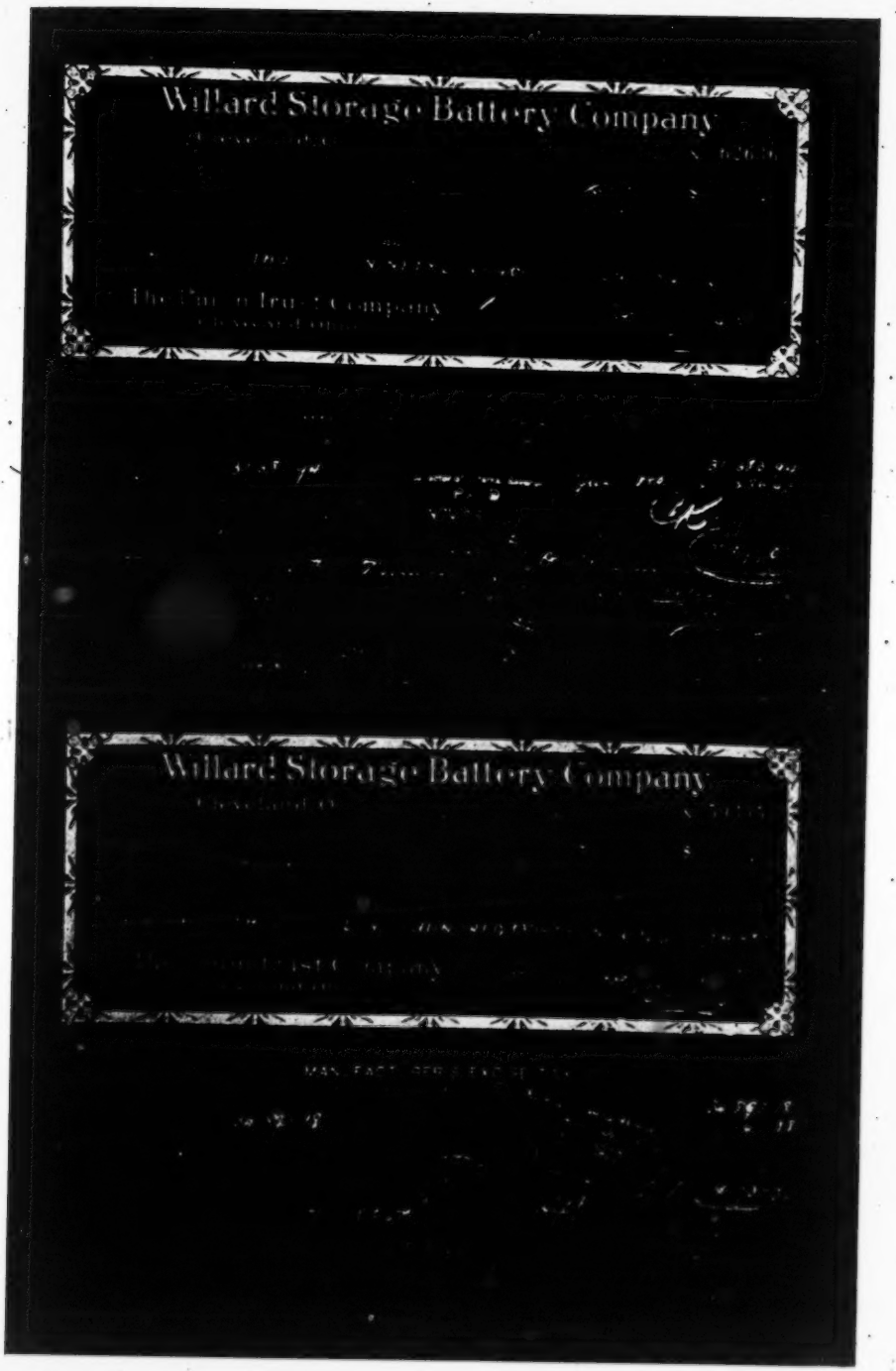


EXHIBIT-A


Willard Storage Battery Company
Cleveland, O.
No. 6619
to The Union Trust Company
Cleveland, Ohio


Willard Storage Battery Company
Willard Storage Battery Company

7 13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in, the sum of $89,195.36, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in exhibit B hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY,
CHARLES C. NORRIS, JR.,
Philadelphia, Pa.
By F. C. FRIEND, *Its Attorneys.*

[*Duly sworn to by C. H. Gibney, jurat omitted in printing.*]

PRAECIPE

To the Clerk of the said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $89,195.36 with interest at the rate of 6% per annum as provided by law on $34,731.30 from October 30, 1922; on $31,097.01 from November 28, 1922; and on $23,367.05 from December 29, 1922, with costs.

CHARLES P. NORRIS, JR.,
Philadelphia, Pa. &
F. C. FRIEND,
Counsel for Plaintiff.

9 *Exhibit "B" to petition*

1922

Month of sales	Date of payment	Amount of tax paid
1922 September	1922 October 30	$34,731.30
October	" November 28	31,097.01
November	" December 29	23,367.05
		$89,195.36

13 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
Account number
District
Date received

Stamp here

Collector of
internal revenue

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector
Collector must indicate in block above the kind of claim, except in income tax cases.

State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative Unit
10/5/26
Stamp here

Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer
14 named, and that the facts given below with reference to said statement are true and complete:

Period — Year
From: January 1st, 1922
To: December 31st, 1922

1 Business in which engaged manufacture of electric storage batteries.
2. Character of assessment or tax manufacturers' excise tax on batteries.
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment $295,344.49
4. Reduction of tax liability requested, income and profits tax .. $.....
5. Amount to be abated ..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable) $295,344.49
7. Dates of payment (see collector's receipts or indorsements of canceled checks) .....
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed—Cleveland, Ohio.
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked; period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved, we are filing this claim for refund by calendar years to cover twelve monthly

payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary, and portable. While they are used very extensively in automobiles, the same storage batteries are used in
15 motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

In view of the above facts we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attach additional sheets if necessary.)

(Signed) F. S. STILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PETERS,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

Amended claim

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan. 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
District
Account number
Date received
Stamp here
Collector of internal revenue

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax case.

16 State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative unit
Stamp here

Willard Storage Battery Company

Type or print (Name of taxpayer or purchaser of stamps).
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State).
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period Year
From: January 1st 1922.
To: December 31st 1922.

1. Business in which engaged. Manufacture of electric storage batteries.
2. Character of assessment or tax _____
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment _____ $295,049.71
4. Reduction of tax liability requested (income and profits tax) _____ $_____
5. Amount to be abated _____ $_____
6. Amount to be refunded (or such greater amount as is legally refundable) _____ $295,049.71
7. Dates of payment (see collector's receipts or indorsements of canceled checks) _____
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed _____
9. District in which unpaid assessment appears _____
10. Amount of overpayment claimed as credit _____ $_____
11. Unpaid assessment against which credit is asked; period from _____ to _____ $_____

Deponent verily believes that this application should be allowed for the following reasons:

17 This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. S. STILES.

Sworn to and subscribed before me this 28th day of October, 1926.

_____ _____ _____
(Title)

(This affidavit may be sworn to before a deputy of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 21, 1927.

Address reply to Commissioner of Internal Revenue, and refer to MT:M:WED. C-1-S-700.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $295,049.71 paid as manufacturer's excise tax on automobile parts and accessories.

You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly thereby rejected for lack of evidence.

Respectfully,

C. R. NASH, *Acting Commissioner.*

EM

18 In United States District Court

Defendant's motion to dismiss

Filed July 8, 1929, in no. 15761

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above-entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 9000 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above-entitled case; that such motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8th day of June, 1929.

CHARLES C. NORRIS, JR.,
F. C. FRIEND,
Attys. for Plff.

19 In United States District Court

Order overruling defendant's motion to dismiss

Entered Dec. 16, 1929, in nos. 15761, 15762, 15763, 15764, 15765, by West, judge

These causes have been submitted to the court on a previous day of this term on the motions of defendant to dismiss, on consideration thereof the court overruled said motions to which ruling of the court defendant by his attorney excepts.

In United States District Court

Defendant's exception to order overruling motion to dismiss

Filed December 18, 1929, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant C. F. Routzahn, collector of internal revenue, 18th District of Ohio, and excepts to the ruling of the court on the motion to dismiss the above entitled and above numbered actions at law, in which ruling the court overruled said defendant's motion to dismiss.

W. J. MAHON,
United States Attorney.

20 In United States District Court

Defendant's answer

Filed April 12, 1930, in no. 15761

Now comes Wilfred J. Mahon, United States attorney for the Northern District of Ohio, on behalf of the defendant herein, by

leave of court first obtained, and for answer to plaintiff's petition admits the corporate capacity of the plaintiff herein; admits that defendant is the duly appointed, qualified, and acting collector of internal revenue of the United States for the Eighteenth District of Ohio, and that the city of Cleveland is located in said district.

Defendant admits that prior to September 1, 1922, and from that date continuously to the present time, plaintiff has been and now is engaged in the manufacture and sale of electric storage batteries in the city of Cleveland, Ohio; that in each calendar month during the period beginning on September 1, 1922, and ending on December 31, 1922, plaintiff made sales of electric storage batteries and on or about the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, plaintiff made a return in accordance with the provisions of title 9 of section 900 of the Revenue Act of 1921 of the computation of manufacturers excise taxes at the rate of 5% of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month; that the amount of the said manufacturers excise tax was set forth in each of the said returns in a single sum and represented the computation of 5% upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month; that exhibit A attached to plaintiff's petition is a true copy of a return made for the month of September 1922, made by plaintiff to defendant; that exhibit B attached to plaintiff's petition sets forth the dates and amounts of money paid by plaintiff to defendant as manufacturers excise tax upon the selling price of electric storage batteries which were manufactured by plaintiff and sold by plaintiff during the respective calendar month set forth thereon; that said payments of taxes were made contemporaneously with and in accordance with the computation of the said excise taxes as set forth in the returns made by plaintiff.

21 Defendant denies that the electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, were commercial commodities and defendant denies that said electric storage batteries were not specifically designed and not primarily adaptable only for use on or in connection with automobile trucks, automobile wagons and other automobiles or motorcycles, and were interchangeable for use in stationary and portable engines extensively in many other industries than the automobile truck, automobile wagon, other automobile and motorcycle industries.

Defendant denies all of the allegations contained in paragraphs 6, 7, 8, and 9 of plaintiff's petition.

Defendant admits that exhibit C, attached to plaintiff's petition, is a true and correct copy of the original receipts executed by defendant for the taxes paid in each calendar month by the plaintiff to and upon the demand of the defendant representing the payment of the taxes by plaintiff.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on or about October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes collected by defendant from plaintiff during the period beginning January 1, 1922, and ending December 31, 1922, a true copy of which claim for refund is attached to plaintiff's petition and marked "Exhibit D."

Defendant denies that on November 3, 1926, plaintiff filed with the Commissioner of Internal Revenue an amended claim for refund of taxes paid during said period, but says that said amended claim for refund was filed October 29, 1926, with the Commissioner of Internal Revenue; a true copy of said amended claim for refund is attached to plaintiff's petition marked "Exhibit E" and made a part thereof.

Defendant admits that said claims for refund were duly rejected by the Commissioner of Internal Revenue on June 24, 1927; defendant denies that there is due plaintiff from defendant the sum of $89,195.30 or any sum whatsoever by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right 22 of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed and that it be allowed to go hence with its costs.

WILFRED J. MAHON,
United States Attorney.

[*Duly sworn to by Wilfred J. Mahon, jurat, omitted in printing.*]

23 In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15761, by West, Judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for

adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

In United States District Court

Trial on progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15761, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

21 In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15761

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia, with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the Eighteenth District of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any governmental department except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods September 1922 to November 1922, inclusive, showing the amount of tax due thereon which was duly assessed on

such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Sept	1922	Oct	1922	50	1	$34,731.30	10/31/22
Oct	"	Nov	"	46	7	31,097.01	11/29/22
Nov	"	Dec	"	57	2	23,367.05	12/30/22

25 6. On October 5, 1926, plaintiff filed its claim for refund #21169 of manufacturer's excise tax paid on electric storage batteries for the taxable periods January 1922 to December 1922, inclusive, in the amount of $295,344.49 which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its amended claim for refund #700 of manufacturer's excise tax so paid on electric storage batteries for the taxable periods January 1922 to November 1922, inclusive, in the amount of $295,049.71, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, JR.
Attorney for Plaintiff.

C. F. ROUTZAHN, *Collector*,
By W. J. MAHON,
U. S. Attorney for Defendant.
By JOHN B. OSMUN,
Asst. U. S. Atty.

E. F. MCMAHON,
Special Atty.

26 In United States District Court

Waiver of Jury

Filed March 9, 1931, in no. 15761

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

In United States District Court

Order consolidating case no. 15761 law with cases nos. 15762-3-4-5—law for trial only

Entered May 14, 1931, in no. 15761, by West, Judge

It is ordered that this case be consolidated with cases nos. 15762, 15763, 15764, and 15765 law for trial only.

27

In United States District Court

Plaintiff's request for findings of fact and conclusions of law

Filed May 15, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Plaintiff respectfully requests that the court make the following: (1) Finding of fact and (b) conclusions of law:

A—FINDINGS OF FACT

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routazhn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the period from September 1, 1922, to and including April 1, 1926, plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods from September 1922 to February 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Amount	Date paid
Sept	1922	Oct	1922	$34,731.30	10/31/22
Oct	"	Nov	"	31,097.01	11/29/22
Nov	"	Dec	"	23,367.05	12/30/22
Dec	"	Jan	1923	22,486.39	1/30/23
Jan	1923	Feb	"	15,076.44	2/29/23
Feb	"	Mar	"	22,133.63	3/30/23
Mar	"	Apr	"	31,792.23	4/27/23
Apr	"	May	"	25,920.09	5/31/23
May	"	June	"	14,657.74	6/30/23
June	"	July	"	15,790.62	7/31/23
28 July	"	Aug	"	12,705.08	8/30/23
Aug	"	Sept	"	22,826.28	9/29/23
Sept	"	Oct	"	17,912.98	10/31/23
Oct	"	Nov	"	26,236.87	11/30/23
Nov	"	Dec	"	21,736.97	12/29/23

Period	Year	Month	Year	Amount	Date paid
Dec	1923	Jan	1924	$16,258.35	1/31/24
Jan	1924	Feb	"	21,221.02	2/29/24
Feb	"	Mar	"	24,783.60	3/29/24
Mar	"	Apr	"	27,383.15	4/30/24
Apr	"	May	"	16,773.84	5/29/24
May	"	June	"	12,834.43	6/28/24
June	"	July	"	11,828.40	7/30/24
July	"	Aug	"	7,736.48	8/30/24
Aug	"	Sept	"	10,577.00	9/30/24
Sept	"	Oct	"	12,768.27	10/31/24
Oct	"	Nov	"	14,910.29	11/29/24
Nov	"	Dec	"	12,779.05	12/31/24
Dec	"	Jan	1925	14,852.63	1/30/25
Jan	1925	Feb	"	8,363.97	2/28/25
Feb	"	Mar	"	11,588.18	3/31/25
Mar	"	Apr	"	12,923.08	4/30/25
Apr	"	May	"	6,639.61	5/29/25
May	"	June	"	6,635.54	6/30/25
June	"	July	"	7,861.95	7/31/25
July	"	Aug	"	15,760.86	8/31/25
Aug	"	Sept	"	18,811.15	9/30/25
Sept	"	Oct	"	22,705.71	10/31/25
Oct	"	Dec	"	26,802.53	12/1/25
Nov	"	Dec	"	21,989.24	12/31/25
Dec	"	Jan	1926	16,793.37	1/29/26
Jan	1926	Feb	"	14,515.68	2/26/26
Feb	"	Apr	"	10,455.52	4/1/26

5. On October 5, 1926, plaintiff filed its claims for refund of manufacturers' excise tax paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,344.49, $243,047.28, $188,448.16, $175,875.19, and $24,971.20, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

6. On October 29, 1926, plaintiff filed its amended claims for refund no. 700, no. 701, no. 702, no. 703, no. 704, of manufacturer's excise tax so paid on electric storage batteries for each year
29 during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,049.71, $249,275.32, $189,853.88, $173,934.45, and $41,764.37, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

7. That the plaintiff, the Willard Storage Battery Company, was incorporated in 1902 and at that time took over the business of manufacturing Willard storage batteries which had been begun in 1895 or 1896 by the Willard Electric and Battery Company under the supervision of Mr. T. A. Willard and which had later been carried on by the partnership of Sipe & Sigler.

8. That payment of the excise taxes in suit was made under duress and after protest by the plaintiff against its collection.

9. That none of the storage batteries upon the sales of which the taxes in suit were paid were sold to manufacturers of automobiles, but practically all of them were sold by the plaintiff to jobbers, distributors, and storage battery and electrical service dealers, and the plaintiff does not know, nor can it ascertain, the uses to which the said storage batteries so sold by it were put.

10. That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for a great many different uses.

11. That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for a great many other purposes.

12. That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was in no way designed or developed specially for use on the automobile.

13. That the parts of the electric storage batteries upon which the taxes in suit were paid were exactly the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, and the only changes in the parts themselves are the changes naturally due to the refinement in art of manufacture developed during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same.

14. That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally, and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes.

15. That the uses of electric storage batteries manufactured by the plaintiff and upon which the taxes were paid, other than the use on automobiles, were not incidental to the use on automobiles.

16. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used.

17. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid were not primarily adaptable for use only on automobiles.

18. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same.

19. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for innumerable uses in every field in which electricity in portable form was required. Their size, shape, and design depended entirely upon the duty required of them, and that duty consisted only of the voltage, the discharge rate of the current, the capacity, and the

31 life of the battery. The duty required for use in automobiles was also required in innumerable other uses and the batteries which were applied to these uses were identical in design with the batteries used in connection with automobiles.

20. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were just as applicable for one use as for another where the duty required was the same.

B—CONCLUSIONS OF LAW.

1. The articles upon the sale of which the taxes in the foregoing actions, to wit, nos. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in subdivisions (1) and (2) of sec. 900, tit. IX, of the Revenue Act of 1921, or sec. 600, tit. VI, of the Revenue Act of 1924.

2. The taxes in the above actions were illegally assessed and collected. The plaintiff is entitled to judgment in suit no. 15761 in the amount of $134,539.38, together with interest at the rate of 6% per annum on the sum of $89,195.36 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15762 in the amount of $366,548.79, together with interest at the rate of 6% per annum on the sum of $249,275.32 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15763 in the amount of $268,470.53, together with interest at the rate of 6% per annum on the sum of $189,853.88 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15764 in the amount of $233,876.28, together with interest at the rate of 6% per annum on the sum of $173,934.45 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15765 in the amount of $54,861.69, together with interest at the rate of 6% per annum on the sum of $41,764.57 from May 15, 1931, to .

Respectfully submitted.

CHARLES C. NORRIS, JR.,
TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.

32 In United States District Court

Defendant's request for findings of fact and conclusions of law

Filed May 15, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and requests the court to find from the evidence adduced at the trial of these cases, each of the following findings of fact in each of the above cases:

1. The use to which an electric storage battery is to be placed determines its design.

2. Plaintiff has failed to show the specific design of electric storage battery required for each of the uses to which its electric storage batteries were used or placed during each of years 1895 to 1926, inclusive.

3. Plaintiff has failed to show the specific duty requirements of each of the uses to which its electric storage batteries were used or placed during each of the years 1895 to 1926, inclusive.

4. Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, automobile wagons, other automobiles, etc., to which its batteries were placed or used during the taxable periods September 1922 to February 1926, inclusive.

5. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, automobile wagons, other automobiles, etc., to which its electric storage batteries were used or placed during the taxable periods September 1922 to February 1926, inclusive.

6. Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its batteries were placed or used during each of the years 1895 to 1926, inclusive, were of the same design required for use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive.

33 7. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its electric storage batteries were placed or used during each of the years 1895 to 1926, inclusive, were the same as the duty requirements of the use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive.

8. Plaintiff has failed to show the specific number of each size and type of electric storage battery manufactured and sold by it for each use to which its batteries were placed or used, other than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive.

9. Plaintiff had failed to show the specific number of each size and type of electric storage battery manufactured and sold by it and upon the sale of which the taxes in question were imposed, which it manufactured and sold for other uses than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive.

10. Plaintiff has failed to show that each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily designed for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles.

11. Plaintiff has failed to show each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily adapted for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles.

12. Plaintiff advertised to the public during the taxable periods in question that numerous designated manufacturers of automobiles and automobile trucks were then using its batteries as original equipment in automobiles and automobile trucks manufactured and sold by such manufacturers.

34 13. Plaintiff advertised to its trade, other than manufacturers of automobile trucks and other automobiles, in bulletins and catalogues put out by it during each year of 1922 to 1926, that each of the specific sizes and types of its electric storage batteries, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was adapted for use as a replacement battery in some make of practically all makes of automobiles and automobile trucks then manufactured and in use.

14. The chief use or principal use to which batteries of the specific sizes and types, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was in automobile trucks and other automobiles.

15. The tax in question, which was paid for the taxable periods September 1922 to February 1926, inclusive, by plaintiff to the defendant, was passed on or collected by plaintiff, directly or indirectly, from its customers and the ultimate consumers.

16. All of the electric storage batteries manufactured and sold by plaintiff, upon which the tax in question was paid for the taxable periods involved, were primarily adapted for use in some make of automobile truck, automobile wagon, or other automobiles.

17. Plaintiff advertised to its trade, other than manufacturers of automobile trucks and automobiles, in bulletins put out by it during the taxable periods involved, that the prices quoted included Federal excise tax.

DEFENDANT'S REQUEST FOR CONCLUSIONS OF LAW

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and requests the court to make each of the following conclusions of law in each of the above cases:

1. That the electric storage batteries manufactured and sold
35 by plaintiff during the taxable periods September 1922 to February 1926, inclusive, upon the sale of which the tax in question was imposed, were manufactured and sold as parts or accessories for automobile trucks, automobile wagons, and other automobiles within the meaning of the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act in 1924.

2. That the defendant is entitled to judgment against plaintiff and in favor of defendant, dismissing plaintiff's petitions at plaintiff's costs.

3. That plaintiff is not entitled to judgment against defendant and in favor of plaintiff in any amount.

W. J. MAHON,
United States Attorney.
By JOHN B. OSMUN,
Asst. U.S. Atty.

In United States District Court

Stipulation re certain exhibits

Filed June 8, 1931, in nos. 15761, 15762, 15763, 15764, 15765

It is stipulated by and between the parties hereto that the following exhibits of plaintiff, to-wit, nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 were duly offered and received in evidence at the trial hereof.

Dated June 5, 1931.

TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.
W. J. MAHON and JOHN B. OSMUN,
Attorneys for Defendant.

36 In United States District Court

Order overruling defendant's motion for judgment

Entered September 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

This day these causes came on to be heard on the motion of defendant for judgment in favor of defendant and against plaintiff, dismissing plaintiff's petitions, and were submitted to the court; on consideration thereof the court denied said motion, to which ruling of the court defendant by his attorney, excepts.

In United States District Court

Defendant's exceptions to the Court's ruling denying and overruling defendant's motion for judgment

Filed Sep. 30, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and excepts to the court's ruling denying and overruling the motion for judgment in favor of the defendant and against plaintiff and dismiss-

ing plaintiff's petitions on the grounds set forth in said motion for judgment, on the ground that said ruling is against the law and there is no evidence to support said ruling.

W. J. MAHON,
United States Attorney.

37 In United States District Court

Findings of fact and conclusions of law

Entered Oct. 26, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

By agreement of counsel, these five cases were consolidated and tried together as one and a jury having been waived in each case by stipulation filed therein and the cases thus consolidated coming on to be heard upon the pleadings and the evidence and the arguments of counsel, and upon consideration thereof the court finds for the plaintiff and against the defendant in each of said cases, and now makes in each of said cases the following findings of fact and conclusions of law.

A—FINDINGS OF FACT

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting Collector of Internal Revenue for the eighteenth district of Ohio.

3. During the period from September 1, 1922, to and including April 1, 1926, plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods from September 1922 to February 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Amount	Date paid
Sept.	1922	Oct.	1922	$34,731.30	10/31/22
Oct.	"	Nov.	"	31,097.01	11/29/22
Nov.	"	Dec.	"	23,367.05	12/30/22
Dec.	"	Jan.	1923	22,486.39	1/30/23
Jan.	1923	Feb.	"	15,076.44	2/29/23
Feb.	"	Mar.	"	22,133.63	3/30/23
38 Mar.	"	Apr.	"	31,792.23	4/27/23
Apr.	"	May	"	25,920.09	5/31/23
May	"	June	"	14,657.74	6/30/23

Period	Year	Month	Year	Amount	Date paid
June	1923	July	1923	$15,790.62	7/31/23
July	"	Aug	"	12,705.08	8/30/23
Aug	"	Sept	"	22,826.28	9/29/23
Sept	"	Oct	"	17,912.98	10/31/23
Oct	"	Nov	"	26,230.87	11/30/23
Nov	"	Dec	"	21,736.97	12/29/23
Dec	"	Jan	1924	16,258.35	1/31/24
Jan	1924	Feb	"	21,221.02	2/29/24
Feb	"	Mar	"	24,783.60	3/29/24
Mar	"	Apr	"	27,383.15	4/30/24
Apr	"	May	"	16,773.84	5/29/24
May	"	June	"	12,834.43	6/28/24
June	"	July	"	11,828.40	7/30/24
July	"	Aug	"	7,736.48	8/30/24
Aug	"	Sept	"	10,577.00	9/30/24
Sept	"	Oct	"	12,768.27	10/31/24
Oct	"	Nov	"	14,910.29	11/29/24
Nov	"	Dec	"	12,779.05	12/31/24
Dec	"	Jan	1925	14,852.63	1/30/25
Jan	1925	Feb	"	8,353.97	2/28/25
Feb	"	Mar	"	11,588.18	3/31/25
Mar	"	Apr	"	11,923.08	4/30/25
Apr	"	May	"	6,639.61	5/29/25
May	"	June	"	6,635.54	6/30/25
June	"	July	"	7,861.95	7/31/25
July	"	Aug	"	15,780.86	8/31/25
August	"	Sept	"	18,811.15	9/30/25
Sept	"	Oct	"	22,705.71	10/31/25
Oct	"	Dec	"	26,802.53	12/1/25
Nov	"	Dec	"	21,989.24	12/31/25
Dec	"	Jan	1926	46,793.37	1/29/26
Jan	1926	Feb	"	14,515.68	2/26/26
Feb	"	Apr	"	10,455.52	4/1/26

5. On October 5, 1926, plaintiff filed its claims for refund of manufacturer's excise tax paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,344.49, $243,047.28, $188,44[illegible].16, $175,875.19, and $24,971.20, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

39 6. On October 29, 1926, plaintiff filed its amended claims for refund no. 700, no. 701, no. 702, no. 703, and no. 704, of manufacturer's excise tax so paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,049.71, $249,275.32, $189,853.88, $173,934.45, and $41,764.37, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

7. That the plaintiff, the Willard Storage Battery Company, was incorporated in 1902 and at that time took over the business of manufacturing Willard storage batteries which had been begun in 1895 or 1896 and was later carried on by the partnership of Sipe & Sigler.

8. That payment of the excise taxes in suit was made under duress and after protest by the plaintiff in May 1919 against the collection of prior similar taxes.

9. That none of the storage batteries upon the sales of which the taxes in suit were paid were sold to manufacturers of automobiles, but the majority of them were sold by the plaintiff to jobbers, distributors, and storage battery and electrical service dealers, and the

plaintiff does not know, nor can it ascertain, the uses to which the said storage batteries so sold by it were put.

10. That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses.

11. That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes.

12. That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed specially for use on the automobile.

13. That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same.

14. That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally, and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes.

15. That the uses of said electric storage batteries, other than the use on automobiles, were not incidental to the use on automobiles.

16. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same.

17. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses and the batteries which were applied to these other uses

were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duties required were the same.

41 B—CONCLUSIONS OF LAW

1. The articles upon the sale of which the taxes in the foregoing actions, to wit, nos. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in subdivisions (1) and (2) of sec. 900, tit. IX, of the Revenue Act of 1921, or sec. 600, tit. VI, of the Revenue Act of 1924, and the said taxes were illegally assessed and collected.

2. In case no. 15761 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $89,195.36, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

3. In case no. 15762 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $249,275.32, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

4. In case no. 15763 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $189,853.88, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

5. In case no. 15764 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $173,934.45, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

42 6. In case no. 15765 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $41,764.57, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

In United States District Court

Order denying defendant's request for findings of fact and conclusions of law

Entered September 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by S. H. West, judge

This day these causes came on to be heard on the defendant's request for findings of fact and conclusions of law; and were submitted to the court; on consideration thereof the court denied said request, to which ruling of the court defendant by his attorney, excepts.

43 In United States District Court

Defendant's exceptions to the refusal of the court to make findings of fact and conclusions of law as defendant requested

Filed Nov. 12, 1931, in nos. 15761, 15762, 15763, 15764, 15765

First. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered one.

Second. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered two.

Third. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered four.

Fourth. Defendant excepts to the refusal of the court to make the finding o fact as proposed by defendant numbered four.

Fifth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered five.

Sixth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered six.

Seventh. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered seven.

Eighth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered eight.

Ninth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered nine.

Tenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered ten.

Eleventh. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered eleven.

44 Twelfth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered twelve.

Thirteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered thirteen.

Fourteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered fourteen.

Fifteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered fifteen.

Sixteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered sixteen.

Seventeenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered seventeen.

CONCLUSIONS OF LAW

First. Defendant excepts to the refusal of the court to announce conclusion of law as proposed by defendant numbered one.

Second. Defendant excepts to the refusal of the court to announce conclusion of law as proposed by defendant numbered two.

Third. Defendant excepts to the refusal of the court to announce conclusion of law as proposed by defendant numbered three.

W. J. MAHON,
United States Attorney.

Copy served by mail.

45 In United States District Court

Defendant's exceptions to findings of fact and conclusions of law

Filed Oct. 26, 1931, in nos. 15761, 15762, 15763, 15764, 15765

1. Defendant excepts to the court's finding of fact contained in paragraph 8 of the court's findings of fact, which reads as follows:

"That payment of the excise taxes in suit was made under duress and after protest by the plaintiff in May 1919 against collection of prior, similar taxes."

in that there is no evidence to support such finding and plaintiff admits no protest, either oral or written, was ever made to or filed with the collector of internal revenue for the eighteenth collection district of Ohio prior to or at the time the taxes in question were paid to the collector.

2. Defendant excepts to the court's finding of fact contained in paragraph 10 of the court's findings of fact, which reads as follows:

"That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses."

in that there is no evidence to support such finding; that such finding assumes all electric storage batteries manufactured prior to their use on automobiles, etc., were of the same design, size, type, cell construction, cell assembly, shape, and construction as those subsequently used on automobiles.

3. Defendant excepts to the court's finding of fact contained in paragraph 11 of the court's findings of fact, which reads as follows:

"That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes."

in that there is no evidence to support such finding; that such finding assumes all batteries to have been of the same design, character, size, type, and construction as the batteries first sold for use on automobiles, etc., and such finding assume the duty requirement of all uses to have been the same, and such finding assumes that there has been no change in the design and construction of electric storage batteries since the advent of the automobile.

46

4. Defendant excepts to the court's finding of fact contained in paragraph 12 of the court's findings of fact, which reads as follows:

"That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed especially for use on the automobile."

in that there is no evidence to support such finding and such finding assumes the duty requirements of a storage battery for use in an automobile to be the same as the duty requirements necessary in all other uses, and such finding assumes that automobiles were built and designed around and to fit a storage battery, and such finding assumes that the use to which a storage battery is to be placed, does not determine the design of such battery.

5. Defendant excepts to the court's finding of fact contained in paragraph 13 of the court's findings of fact, which reads as follows:

"That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same."

in that there is no evidence to support such finding and such finding assumes no changes were made in the container, vents, size, shape, plate area, connection, arrangement, cells, cell construction, and design of electric storage batteries subsequent to the advent of the automobile as compared with the batteries manufactured by plaintiff's predecessors in 1895 or 1899, and that such finding assumes that the use to which a battery is to be placed, is not determinative of the design of such battery and such finding assumes equal numbers of batteries to have been sold for use in connection with automobiles.

47

6. Defendant excepts to the court's finding of fact contained in paragraph 14 o fthe court's findings of fact which reads as follows:

"That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally, and widely manufactured and sold

for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them into such a commercial article as would ordinarily be sold for general use for a great many different purposes",

in that there is no evidence to support such finding and such finding assumes all other uses require an electric storage battery of the same size, type, shape, cell arrangement, plate area, portable characteristics, construction, and design as is required for use on automobiles, etc., and such finding assumes the duty requirements of such other uses to be the same as the duty requirements of a battery for use on automobiles, etc., and such finding assumes no batteries were designed or manufactured for a given, specific use such as radio use, etc.

7. Defendant excepts to the court's finding of fact contained in paragraph 15 of the court's findings of fact which reads as follows:

"That the uses of said electric storage batteries other than the use on automobiles were not incidental to the use of the automobiles",

in that there is no evidence to support such finding and plaintiff admits the predominant and chief use of the sizes of batteries upon which the tax was imposed to have been on automobiles, automobile trucks, and automobile wagons.

8. Defendant excepts to the court's finding of fact contained in paragraph 16 of the court's findings of fact which reads as follows:

48 "That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adapted for use in stationary engines, marine engines, tractors, radios, and for a great many other purposes where the duty required was the same and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same",

in that there is no evidence to support such finding and such finding assumes that the duty requirements of stationary engines, marine engines, tractors, and radios require a battery of the same design, size, shape, cell arrangement, plate area, plate thickness, type, and construction as is required in batteries for use on automobiles, etc., and such finding assumes that all other devices or uses possess the same duty requirements as is required of a battery for use in automobiles, etc., and such finding assumes that the delivery of electric current constitutes performances of the duty requirements necessary and required of a battery for use in an automobile regardless of the design and lasting qualities of such battery.

9. Defendant excepts to the court's finding of fact contained in paragraph 17 of the court's findings of fact which reads as follows:

"That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the

special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses and batteries which were applied to these other uses were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duty requirements were the same",

49 in that there is no evidence to support such finding and such finding assumes that the duty requirements of various other uses are the same as the duty requirements of automobiles, etc., and such finding assumes that the supplying of electric current for a given purpose is the same as the performance of the duty requirements necessary in the use of a battery on automobiles and such finding assumes that the duty requirements of the other uses are the same as the duty requirements of batteries for use in automobiles and such finding assumes that all batteries are of the same size, shape, type, plate area, plate thickness, cell arrangement, and design as is required of batteries for use on automobiles.

CONCLUSIONS OF LAW

1. Defendant excepts to the court's conclusion of law contained in paragraph 1 of the court's conclusions of law, which reads as follows:

"The articles upon the sale of which the taxes in the foregoing actions, to-wit, nos. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in Subdivisions (1) and (2) of sec. 900, title IX of the Revenue Act of 1921, or sec. 600, tit. VI of the Revenue Act of 1924, and the said taxes were illegally assessed and collected."

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928 ineffective and unenforceable: that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

2. Defendant excepts to the court's conclusion of law contained in paragraph 2 of the court's conclusions of law which reads as follows:

"In case no. 15761 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $89,195.36, together with interest upon the amounts of taxes paid from the

50 date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.".

in that there is no evidence to support such finding and such conclusion renders the provisions of sections 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of

the Revenue Act of 1928 ineffective and unenforceable; that such conclusion of law is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

3. Defendant excepts to the court's conclusion of law contained in paragraph 3 of the court's conclusions of law which reads as follows:

"In case no. 15762 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $249,275.32, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check."

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928 ineffective and unenforceable; that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

4. Defendant excepts to the court's conclusion of law contained in paragraph 4 of the court's conclusions of law which reads as follows:

"In case no. 15763 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $189,853.88, to gether with interest upon the amounts of taxes paid from
51 the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check."

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928, ineffective and unenforcible: that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

5. Defendant excepts to the court's conclusion of law contained in paragraph 5 of the court's conclusions of law, which reads as follows:

"In case no. 15764 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $173,934.45, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check",

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924

and section 424 of the Revenue Act of 1928, ineffective and unenforcible; that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

6. Defendant excepts to the court's conclusion of law contained in paragraph 6 of the court's conclusions of law, which reads as follows:

"In case no. 15765 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $41,764.57, together with interest upon the amounts of taxes paid from the
52 date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check".

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928, ineffective and unenforcible; that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

W. J. MAHON,
Atty. for Deft.

In United States District Court

Opinion of Court

Entered Sep. 15, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

WEST, District Judge:

No lengthy opinion is required. Under the facts found, the plaintiff's batteries were not "parts" of automobiles. Universal Battery Co. v. U.S., 281 U.S. 580. They were equally adapted for use on automobiles and many other machines making use of electric energy. They antedate the automobile and were not called into existence by its advent. And they seem to be no more a "part" of an automobile than of a power boat, a dental drill, a time-clock, or any other of the many devices to the operation of which they are
53 necessary. Being just as essential and just as well adapted to use in a multitude of other machines, they are not primarily adapted for use in motor vehicles. Phila. Storage Battery Co. v. McCaughn, Collector, 21 F. (2d) 320; Elec. Storage Battery Co. v. McCaughn, Collector, (D.C.E.D. Pa.) unreported; Weir, etc. v. McGrath, Col., 41 F. (2d) 1021 (C.C.A. 6), affirming a decision by Judge

Hickenlooper, reported in Cum. Bull. VII-2, p. 338, which disposes of the government's claim of voluntary payment. Payment of the taxes was not voluntary, but if it was, still the action lies in view of the amendment of R.S. 3226 by the Act of June 2, 1924.

The objection to the court's jurisdiction founded on sec. 424, Rev. Act 1928 (tit. 26, sec. 2424 U.S.C.) has heretofore been ruled on. There is an error in that opinion where it is said that any refund after judgment would be pursuant to sub (3) of sec. 424 and would be conditional and for the benefit of consumers. If refunds are made, they may be under either sub (2) or (3), depending upon whether the plaintiff bore the tax or passed it on, etc. Those are matters for the Commissioner to decide; the court has nothing to do with them, and no evidence respecting them was offered.

According to two recent decisions of the Court of Claims, Boyle Valve Co. 1. U.S., 38 F. (2d) 135 and Jefferson Elec. Mfg. Co. U.S., id. 139, the absence of such evidence should prevent recovery. But with great respect, I am unable to agree with the holdings on that point. I still think it is for the Commissioner alone to determine the facts necessary to be established as the basis of refunds under either sub (2) or (3). Where as here, taxes on sales not taxable have been collected, then on proof to the satisfaction of the Commissioner "that such amount was not collected, directly, or indirectly, from the purchaser or lessee", or if collected, has been returned, they may be refunded. "Such amount" refers back to "any amount paid or collected from any manufacturer, producer, or importer" and not to the excessive payments mentioned in the first clause of sub (2). "Any amount paid or collected", etc., will include payments that are excessive and those which are wholly illegal. If that is not so, then the case of the man who pays a tax which is entirely illegal and who does not pass it on to his customer, is unprovided for; he can get no refund, while the manufacturer
54 who is merely overassessed may. Congress could not have intended such an unjust result, and the language employed can very properly be construed to prevent it.

A certificate of probable cause under tit. 28, sec. 842, U.S.C., will issue for the benefit of the defendant.

At the conclusion of the evidence, defendant moved to dismiss the petitions and for judgment in his favor in each case, which motion was overruled and exceptions allowed. Both parties requested findings of fact and conclusions of law and, with some changes, the draft presented by plaintiff has been adopted. Defendant's exceptions to the special findings and conclusions, and to the refusal to find as he requested, were duly allowed.

Judgments for plaintiff as prayed, with interest as provided by law. See sec. 615, Rev. Act. 1928.

Sept. 15. 1931.

In United States District Court

Order of judgment

Entered Oct. 27, 1931, in no. 15761, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $89,195.36, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the
55 Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check to wit:

$34,731.30 from October 31, 1922;
31,097.01 from November 29, 1922;
23,367.05 from December 30, 1922.

It is further ordered that plaintiff recover its costs herein expended, taxed at $_____.

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved as to form.

W. J. MAHON, *U. S. Atty.*

In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15761

The court having rendered judgment herein in favor of the plaintiff in the amount of $89,195.36, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified, and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise, and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

56 In United States District Court

Defendant's narrative form, bill of exceptions

Filed Dec. 14, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Be it remembered that on the trial of the above-entitled causes, consolidated by agreement of counsel, in the District Court of the United States, Northern District of Ohio, Eastern Division, at the April 1931 term thereof, before Honorable Samuel H. West, one of the judges of said court, a jury being waived in writing, the following proceedings were had:

Appearances: On behalf of the plaintiff, Charles C. Norris, Jr., of Hepburn & Norris; W. T. Kinder, of Tolles, Hogsett & Ginn; F. C. Friend, Esq., and Philip Dechert, Esq. On behalf of the defendant, E. F. McMahon, Esq., and John B. Osmun, Esq., assistant United States attorneys.

Thereupon statements of the case were made by counsel for the respective parties.

PLAINTIFF'S TESTIMONY

Willard L. Reinhardt, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Willard L. Reinhardt. I am chief engineer of the Willard Storage Battery Company, and have been such since November 1929. Previous to 1929 I was chemical engineer for the Willard Storage Battery Company from 1920. Previous to 1920 I was chemist for the Willard Storage Battery Company, starting in June 1918. Prior to 1918 I was superintendent and teacher in Auburn Township consolidated schools, consisting of high schools and grade schools; also teacher of science and mathematics. I had no business experience prior to 1918.

57 In my experience at the Willard Storage Battery Company I am familiar with the storage batteries manufactured by that company, and with the parts and functions of the storage battery. A storage battery is a device for storing electric energy in a chemical form, and of later delivering that electrical energy in electrical form. First we have a container which is usually made out of rubber or other composition materials. Then we have—which I will show you here—an element. This element consists of a cover also and is concealed in the container, and a vent plug to prevent the sloppage of electrolyte, and positive and negative groups. On the negative group we have negative plates which consist of a lug which is burned to a connecting strap. This grid or antigrid or framework is filled with active material. This active material in the case of the negative plate consists of finely divided

metallic lead commonly known as sponge lead. This shows the cover and the two connecting straps a little better, and these rubber casings are to prevent seepage of electrolyte, and the plates are burned onto these straps. Now, we have here a positive plate which is almost identical with the negative plate, except that the active materials are lead peroxide, a very highly oxidized lead. Between the positive and negative plates we have a separator which may be of wood or other forms of perforated rubber. Then after we have the positive and negative plates and separators assembled into this element with its connecting straps and terminal posts, we fill the battery with electrolyte, which is a dilute solution of sulphuric acid. These positive and negative plates alternate in position, which you can determine by looking at the edge of the cell. The brown one is the positive, then next we have a gray one which is negative, another positive which is brown, and so on. The only connection between the elements is at the top. If there is not a separator in the electrolyte, then we have what we call a short circuit and it fails to operate.

When a battery is being charged the current is applied at the positive post—this post; it passes through to the positive plates; then through the electrolyte, through the separators to the negative plate and out the negative post. In doing that the material on the positive plate is oxidized to a very high state of oxidation, and the negative plate is reduced to very finely
58 divided metallic lead. Now when a battery is being discharged the reverse is true. A current passes in the other way and the positive plate reacts with the electrolyte, the active material of the positive plate reacts with the electrolyte, forming lead sulphate; and the same happens on the negative plate—the sponge lead reacts with the sulphuric acid and forms lead sulphate. Then in a discharged battery we have primarily lead sulphate on both positive and negative plates, and therefore it fails to function in giving off any more current, because the two plates are essentially alike at that point. When a battery is charged the electrical energy is stored in chemical form, and it discharges by reason of the application of the circuit, which means the attaching of a wire from the positive to the negative. By this reversed chemical action the electrical energy is discharged from the battery in the form of electric current.

The term "volt" is quite clear to explain in lay language. It probably can best be explained by using the ordinary water analogy which is quite generally known. For instance, if we have water in a closed pipe system we must have pressure to force that water through that system. That pressure is usually denoted or termed in pounds per square inch, or head. In an electrical system we must also have some pressure to force the current through a conductor. It is very analogous to the water analogy. A volt is the term applied

to the electrical pressure which forces electric current through the electric system.

In reference to the word "ampère", in the water system we always have a definite amount of water flowing. This is usually termed gallons per minute, or may be termed just gallons. The same is true in an electric system; there is always a certain amount of current flowing. The amount of current flowing is termed the ampere, the same as gallons applied to the water system.

In explanation of the expression "ampere hour"—in the water system if you have one gallon flowing for an hour, that would be that many gallons, that would be one gallon an hour; in an electrical system if we have one ampere flowing for one hour, we have one ampere hour. It is the product of the two.

The explanation of the phrase "internal resistance" as ap-
59 plied to an electric storage battery, is that every electrical conductor offers some resistance to the passage of electricity or current. When we speak of an electric system in which a storage battery is a part, we always refer to the internal resistance of the storage battery as being that part of the resistance of the entire circuit, which is between the two terminals of the storage battery.

I have explained the various constituent parts of a storage battery by taking one group of elements from a particular compartment. That group is called an element; or placed in a suitable container, it is called a cell. A cell produces two volts. The voltage of a cell is always two volts regardless of the size of the plates or the number of the plates. The cells which I hold in my hand, being approximately 5½x7½ inches, produce two volts; a cell containing the same number or a larger number or a fewer number of plates, the plates being three to four feet high and two feet wide, produce two volts. A similar cell containing plates as small as two by three inches, with a greater or smaller number of plates, also produces two volts. A cell always produces two volts. If the duty required of the battery is in excess of two volts, you acquire that by using more cells. A cell is essentially a storage battery. We usually define a storage battery as consisting of one or more cells, depending upon the duty required.

There is no difference in the constituent parts of the storage battery from the day they were first invented to the present time. There have been improvements in the methods of manufacture, to the extent that batteries can be produced cheaper and meet competition. The constituent parts of a storage battery have always remained the same. The active material of the positive plate in the original experiments of Plante was lead peroxide; the negative material—the active material of the negative was finely divided lead. They are still the same active material. They still have identically the same constituent parts as they had at the very beginning.

The theory of the storage battery was first discovered by Plante in 1859. It found very few uses for the first twenty years, due to the fact that it took a long time to produce a storage battery. Plante in discovering the theory of the storage battery found that by immersing two lead plates in dilute sulphuric acid and passing
60 a current through them, they produced on one plate a film of lead peroxide, on the other a crystaline finely divided, lead deposit. Then connecting the two terminals of these plates which were immersed in sulphuric acid, he found that he produced a current, produced electricity. Now this simple cell of Plante remained a little more than a laboratory experiment until about 1880, when, almost simultaneously, Charles F. Brush, of Cleveland, and Fourier, of France, discovered a new means of producing a battery; that is, of casting a framework of lead and applying the active materials to that framework. The industry was also given further impetus at about that time by the development of the dynamo or electric generator for charging storage batteries. Previous to this time the only method available for charging batteries was primary cells.

A primary cell is one which cannot be recharged. A dry battery is a primary cell. With the development of the electric generator—and also I might mention that by this time they had found quicker and better methods of forming Plante plates, which also gave the industry impetus—the industry grew, and they were finding a wide variety of uses after 1880. Some of these uses were driving dental tools, tramways, ignition of gas engines, the driving of sewing machines, electric fans, and various applications where electric motors could be used. They were also used in railway lighting, electric signals, and vehicle or carriage lights about this time. They were also used on electric enunciators or bell ringing. In the period 1888 to 1893 the industry was retarded to a considerable extent by several companies holding storage battery patents, which resulted in the situation that one company could hardly go ahead without infringing the patents of the other. This retarded the industry to a considerable extent, and was finally cleared up in 1893 or '94. Beginning 1893 or 1894 storage batteries began to be manufactured and used in a wide variety of uses, as train lighting, traction batteries for hauling materials in plants, and also for other uses of railway lighting, railway signals, and central stations. Generally, it was a very wide use as the field of uses for portable electricity developed. One of the largest uses after 1893 was railway lighting, railway signals, carriage lighting, telephone work, telegraph, and ignition in gas engines, and, up to the present time, for radio.

61 As to the first use of storage batteries in connection with automobiles—in about 1908—they were used for automobile lighting. The use never became very extensive in the same respect it has today. Automobiles had been lighted by acetylene lamps, but the first use of storage batteries to any respectable extent was beginning about 1908 to 1910. In 1911 Mr. Kettering applied the

storage battery to the automobile for the purpose of starting, lighting, and ignition. He invented a starting, lighting, and ignition system which he sold for use in automobiles. It is generally known in the industry that he selected a battery for that purpose—24-volt battery, which was formerly used for railway signal work. A 24-volt battery means a 12-cell battery. It was determined that that particular battery was applicable to that starting device because it was a battery that was suitable for the duty requirements of that particular job. That starting device was not used extensively immediately after 1911 or '12. I would say it was used extensively beginning 1912 or 1913. After that the field of use was a very large one because there were so many internal combustion automobiles.

The principle of the cranking device for internal combustion engines, contemporaneously with the use on automobiles, was used in isolated house-lighting plants and on motor boats.

The COURT. Are you talking about the Delco system now?

The WITNESS. Yes.

Mr. NORRIS. That is a generic term. There are a number of systems.

The COURT. Well, the Dayton Electric Laboratories Co. was organized by Kettering, wasn't it?

The WITNESS. Yes; house lighting.

The COURT. He had a system known as a house-lighting system, which included starters?

Mr. NORRIS. Yes.

62 The COURT. You say the starter was applied to various other uses besides automobiles?

The WITNESS. Yes, sir.

(Narrative continued:) As I said, the starter was applied to house lighting and starting engines, such as gas engines, diesel engines, tractors—starting devices have been used on tractors.

I have stated a storage battery is a device for storing electricity in portable form. There is practically no limit to what a storage battery can be used for. It all depends whether the requirements are such that it can be used. The discharge rate of a battery is the amount of current that is flowing at a particular time. There is a difference within the battery itself as to the discharge rate. That difference is usually accomplished by using either larger plates or a limited number of plates to accommodate—to secure a battery for a larger discharge rate. I mean by that there must be an increased area of plates subjected to exposure to the electrolyte. If that is so there is a higher discharge rate at a particular time than if there was a smaller area of plate surface exposed for the action of the electrolyte; a battery with a large number of plates is capable of a higher discharge rate than one with a smaller number of plates.

The COURT. Is that true of batteries of equal number of plates, but in one battery of plates a greater area than the other?

The WITNESS. It all depends on the area.

The COURT. I understand; but it is not the number of plates that is the controlling factor, but the area of the combined plates?

The WITNESS. The area of the combined plates.

Q. In other words, if you desire to increase the discharge rate of this battery having these particular plates, you would either have plates of larger size or a greater number of plates?

A. Yes, sir.

63 Q. Mr. Reinhardt, is there any distinguishing characteristic which makes a storage battery primarily adaptable for use only on an automobile?

Mr. MCMAHON. The Government objects to that question for the reason it calls for the conclusion of the witness.

The COURT. I will hear from you, if that is the question the court has to decide.

Mr. MCMAHON. Yes; not only the question the court has to decide, but here is the question—the question is not limited to the essential elements that he mentions. In other words, they are not fixed. If the court please, the objection is fundamental in this: Here you have a six-volt battery which normally is used in automobiles. He has been describing here in general terms batteries; he has been talking about batteries with plates from two to ten feet high. He has not taken into consideration the elements; he has not taken into consideration the numbers of the plates; he has not taken into consideration the duty to be performed which is determinative of the design of the battery. In other words, any answer that the witness might give without knowing those definite things, that is, what is particularly mentioned or what he is particularly seeking to inquire of limiting the batteries, would be a hazardous guess on a general basis.

Mr. NORRIS. May I suggest, to shorten it, if I ask the question whether there is any distinguishing characteristic in a storage battery adaptable for use on automobiles which makes it primarily adaptable only for use on automobiles? Then I think my question is without error.

Mr. MCMAHON. The Government objects to that question, too, because it calls for the conclusion of the witness and is usurping the power of the court.

The COURT. Just reframe your question.

64 Q. I will ask you, Mr. Reinhardt, does a storage battery perfectly applicable for use in an automobile have any distinguishing characteristic which makes it peculiarly adaptable for use only on the automobile?

Mr. MCMAHON. The Government objects to that question, for the reason it is calling for the conclusion of the witness and usurping the power of the court.

The COURT. Objection overruled.

Mr. MCMAHON. The Government excepts and reserves the right to file a bill of exceptions.

A. No.

Q. Mr. Reinhardt, after all, what is the criterion of a storage battery? A. It is the duty requirements.

Q. So that in every use of storage batteries where the duty is the same, is a battery applicable for one use just as applicable for another use? A. If the duty requirements are the same, it is.

Mr. NORRIS. May I correct that question? Instead of using the word "applicable" I would like to use the word "adaptable." Cross-examine.

Cross-examination

By Mr. McMAHON:

In my direct examination I testified that the batteries back in 1908, '11, '18 '20, '29, on up to the present day had the same constituent parts, which you can call elements. By the same constituent parts I mean the same materials; in other words, I mean the same base raw materials. In many cases the plates used in batteries today, in each cell of the batteries today, are the same size and type as the plates used in the batteries in 1908, namely, in the case of batteries used for a variety of purposes. For example, various lighting batteries, portable lighting batteries. The Willard Company made a battery, a six-volt battery in the early days which was used. I mean in the period specified, around that period, which was used for a variety of purposes, ignition purposes and lighting purposes. It may have been on an automobile; the ignition may have been for gas engines or other purposes; it may have been lighting for boats. The starting batteries used in 1908 had the same base materials as those used in 1924. With regard to the actual number of plates. I couldn't answer the question. I can't answer that question whether they are actually the same as used today or not.

I am chief engineer of the Willard people. We have replicas of batteries manufactured by the Willard people in 1908. I don't have any drawings, pictures, or anything that would give the Court an idea of the kind of battery used in 1893 and '94. I don't know whether we have one of the 12-cell, 24-volt batteries used on the Cadillac at first or not.

Mr. NORRIS. Let me interrupt. We have it here.

Mr. McMAHON. I ask that this article produced by the plaintiff be marked as an exhibit.

The COURT. Do you intend to keep this battery in the record?

Mr. NORRIS. No; we are going to substitute photographs.

The COURT. Then don't mark the battery. Why don't you agree that the picture represents the battery?

Mr. NORRIS. The battery which the witness has been demonstrating is shown by the photograph, plaintiff's exhibit 1.

Q. Mr. Reinhardt, I hand you what has been marked plaintiff's exhibit 1, and ask you to state what that is.

The COURT. We have all agreed that it is a photograph of this battery, so that is in the record. Proceed with something else.

(Narrative continued.) I don't know how many plates are in this exhibit 2. Those exhibits show those batteries to have the same number of cells. They do not show the sealings and covers to
66 be the same. They show the exhaust to be the same principle. They are not the same. There is necessarily a difference between the vent plugs of the two batteries, due to the construction of the cover. The purpose of any vent plug is to prevent acid spray coming out of the battery. Now, it may be it was found that the vent plug in no. 1 did that job better or was cheaper to manufacture than vent plug in no. 2. The batteries used in a large submarine boat have vent plugs. As I recall it, they are not exactly the same, but they answer the same purpose. The batteries used in connection with stationary engines have covers. It might not be necessary in some cases to have a cover. The purpose of a cover is twofold: to keep the dirt out and to keep electrolyte in. The cells on charge are usually gassing in the end of the charge, and that gas will carry with it sulphuric acid, which is likely to corrode equipment, especially metal equipment very near it. It is absolutely necessary to have a cover if you have corrodable equipment near it. There are parts of the engine that would be corroded by acid spray. If the battery was 30 or 40 feet away from the engine, whether it would be necessary to have a cover or vent plug would depend upon the charging rate and size of the room.

Plates used by LaPlante in his first experiment were sheets of pure lead. His experiments with pure lead plates were not very successful. I don't know whether the pure lead plates that LaPlante used in the batteries he constructed were of the same size and shape as the lead plates used in batteries similar to plaintiff's exhibits 1 and 2.

The old time crowfoot battery—in glass jars, five fingers sticking out forming a lead pole—was a primary battery, not a dry cell; one that is not rechargeable. The crowfoot battery that was used in connection with telegraph instruments back around the '90s was primary and not rechargeable. When that battery had served its purpose, electricity was renewed usually by restoring the solution and adding a new zinc crowfoot. That is an entirely different type of battery from plaintiff's exhibit 1.

I know very little about the history of the Edison storage battery. I think that was developed a little after the acid type batteries. The basic elements in the Edison type battery manufactured by the Edison Company are not the same as those shown in plaintiff's ex-
67 hibit 1. The basic elements in our battery, exhibit 1, are sulphuric acid electrolyte, lead peroxide on the positive plate, and sponge lead on the negative. The Edison has alkaline electrolyte, iron oxide plate, and a nickel oxide plate. I don't know if the size, shape, and dimension of those plates as used in the Edison batteries of the six-cell type are the same as in plaintiff's exhibit 1.

There are advantages in adopting the acid type battery over the alkaline battery. The voltage of the alkaline battery, as I recall it, is one and a half volts per cell, while this is two volts per cell. That

is the main advantage. For the same capacity the Edison battery might require more space. That would not necessarily affect the matter of portability. I didn't say it weighed more; it may weigh less. It is a larger battery and it is more bunglesome to handle. That affects the question of portability to that extent, at least. I would say the acid type battery was more adaptable for use in starting the ordinary automobile than an Edison storage battery of the same number of cells for that purpose, because the Edison storage battery has less voltage per cell. That might also be true when it comes to the matter of space in carrying, or the portability of the battery. It would possibly require a little more space.

They have both six and twelve volt batteries that are used on motor boats; I wouldn't say all motor boats. I can't give that answer as to the sizes of all batteries used on all motor boats. I don't believe I made the statement that the 24-volt battery was used generally on motor boats in 1912 for starting purposes. The starter I stated Dr. Kettering invented was for starting an automobile. It could be used for starting a motor boat. There would not necessarily have to be any changes in it if the duty requirements were the same. A motor boat engine couldn't set on the same level an automobile engine does. It might not necessarily be the same.

The same cells used in a 24 volt battery are used in railway signal work. A 24-volt battery is a 12 cell battery. I said the same cell was used for railway signal work. Dr. Kettering selected the 24-volt or 12 cell battery for use in connection with his starter. I didn't say that starter was used on motor boats. I don't know that was the battery used on motor boats. I cannot say it was used on tractors.

I don't know whether it actually was used on lighting plants
68 or not; I don't know. It had some uses. I know that it was used for signal work. I don't know how many of those signal work batteries were used during that period. In those early days tractors were not used as extensively as they are today. The batteries used might not be extensive, but it would be general use. They could be a general use. If you have 500 light plants in the United States in those days using this 12-cell, 24-volt battery, I would call that an extensive use only in that particular industry. As far as territory is concerned, it would be rather limited.

I don't recall the date tractors first came onto the market. It has not been so very long ago. I can't answer whether it was some time after the automobile. The duty to be performed on a tractor is the same as that to be performed on an automobile, generally speaking. Tractors don't generally have the same number of cylinders, usually less than an automobile engine. The cylinders are wider, too. You may have more gasoline consumed. The more gasoline you have in a cylinder head, the more spark it takes to ignite it.

Q. And you told us the use to which a battery is to be put determines its design, didn't you?

A. The duty requirement——

Mr. NORRIS. Pardon me; that is not what he said at all.

Q. The duty requirement——

A. Is what determines the battery to be selected for a particular use.

Q. Then a tractor having a motor with less cylinders, and consuming more gasoline than an automobile in its larger size cylinders and greater piston displacement, requires a greater spark or greater delivery of current during a given instant than is required in a motor used in an automobile, isn't that correct?

A. It may or may not be. There are a lot of factors involved there that you can't give a definite answer.

The Court. Well, tell the court whether as a practical matter batteries on tractors differ from those on automobiles?

The Witness. No, the same batteries have been used both on tractors and automobiles.

69 Mr. McMahon. We don't dispute that, not at all. There is no question in my mind but what you can take a battery that you use on an automobile and put it——

The Court. Put the question to him. I want to get the case tried with reasonable speed.

Q. Does a battery used on or in connection with an automobile require more rugged construction than a battery used on or in connection with a tractor?

A. No.

Q. Does an automobile cross the same terrain that a tractor crosses?

The Court. You don't need to answer that question. Those are matters that the court knows. Let's get along and don't waste time on unnecessary questions.

Mr. McMahon. I beg the court's pardon. It was my understanding that he testified that the duty to be performed was the thing that determined the battery, and I was trying to find out if the duties of the two were the same.

The Court. I was trying to make that plain. He was talking about the duty of the battery, not the duty of the machine upon which the battery was located.

Mr. McMahon. The operation of the machine is the thing.

The Court. The battery doesn't operate the machine. Proceed.

(Narrative continued:) A battery that is made for lighting purposes on an automobile can be used for starting purposes. Batteries used on automobiles today are designed for starting, lighting, and ignition. Prior to the advent of the automobile we had batteries that were used for lighting purposes. Batteries used for lighting purposes require the delivery of current for a longer period of time. That current is supplied by the storage battery. That affects the construction of the storage battery: you would have to have either larger plates or a larger number of plates. They could

70 be the same thickness. If you wanted the plate to give longer life then you would have to make it thicker. A battery that is used only for ignition purposes on an automobile, I have seen

used for starting the motor. That is the battery setting right there [indicating]. That is a six-cell battery. A one-cell battery will deliver two volts. Two volts is sufficient to supply the ignition, but will not turn over the ordinary automobile engine.

Q. Did the adoption of the battery for use in starting, lighting, and ignition of an automobile necessitate a change in the size of plates of batteries formerly used for lighting automobiles or for signal work?

A. No.

Q. Then the added duty of starting automobiles and ignition of automobiles to the battery formerly constructed for lighting purposes did not necessitate a change in the construction of the battery?

A. It might require more plates.

Q. Well, that would be a change in the battery, wouldn't it?

A. Yes.

(Narrative continued:) The battery used for starting an automobile does not require a thinner plate, neither does the battery for lighting. None of them require a thin plate. To have a thin plate is a matter of economy. The thin-plate battery will not have a longer life than a thick-plate battery. A thick-plate battery will deliver as great a current at a given point at a given instant as a thin-plate battery if it has the same number and size of plates. You can't put the same number and size of plates in the same dimensioned cell; that is, thick plates and thin plates.

The design of a battery is determined by the duty that is required of it. I do not necessarily mean the delivery of the current only. Voltage is a factor. You might have an electrical appliance that would require ten, twenty, or thirty volts. Convenience of portability would be a factor in the design.

As to how I account for the various changes taking place in the construction of batteries between 1911, when the Cadillac adopted the 12-cell battery, and 1924, most of the changes have been matters of refinement and mainly for the reason of lowering costs, so that the commodity can be sold to the public at a lower price. There
71 is not much change in the duty required of the 12-cell battery used in 1911 and the 6-cell battery used in 1924, for starting, lighting, and ignition of automobiles. There isn't much change in duty requirements or in the construction. The development from the 12-cell battery in 1911 to the 6-cell battery in 1924 is due to the fact that the six-voltage battery could be manufactured cheaper than the twelve-volt battery. The six-volt battery performed the same duty that the 12-cell battery did.

Q. Well, how do you harmonize that with your statement that the duty to be performed determines the design or the use to which a battery is to be placed? A Well, certain duty requirements that have to be met. It is power that you are after to get in a battery. You can get that one of two ways; you can use a higher voltage and

fewer plates, or lower voltage and a larger number of plates and get the same power.

Q. Well, what I am trying to find out from you is this: Why did they quit using the 12-cell battery and start using the 6-cell battery? A. It is my opinion it was largely a matter of economy.

(Narrative continued.) The connections used on the battery, plaintiff's exhibit 1, and those used on plaintiff's exhibit 2, are different. That may be brought about because the original duty requirements of this battery may have been less than this battery. I don't think they were exactly the same size cells. The battery has the same voltage. One of the connectors on plaintiff's exhibit 2 is corroded. You will notice that there were two nuts that held that connector on, and between those two nuts tighten on a brass stud; sometimes the acid gets in there and corrodes that. That cannot occur in the connector shown on plaintiff exhibit 1. There is a difference in the construction of those two batteries with respect to intercell connections. You could not fit the intercell connector of plaintiff's exhibi 2 on the terminal post of plaintiff's exhibit 1. I don't recall the exact date when that change was effected; I can't give an idea about when. Plaintiff's exhibit 2 was the 1908 battery and plaintiff's exhibit 1 is a 1931 battery. It apparently occurred between 1908 and 1931.

Necessarily there are some changes in the first starter made by Dr. Kettering and the starter used on a majority of the automobiles on the streets today, because the first starter was 24 volts; now
72 the majority of them are six volts. Power requirements of the starter used on an automobile has something to do with the design and construction and assembly of the battery used on or in connection with that automobile engine. I can recall no specific changes occurring in those starters around 1919, 1926. They used to have starters that pullled a chain—pushed down on a long pedal and a chain was pulled; you didn't have the lever of today and the convenient little button you push in the bottom of your car. I don't know whether the vent plug in the 12-cell battery they used on the Cadillac in 1911 is the same as the vent plug in plaintiff's exhibits 2 and 1. The 24-volt battery used in 1908 had sufficient plate area to be used regularly for starting a Cadillac. I don't know of any automobile today that uses the same number of cells in its battery for starting, lighting, and ignition purposes as were used in 1908. Plaintiff's exhibit 2 would perform the same duty in 1924 that it was made to perform in 1908.

(Noon recess taken.)

Defendant's exhibit A is a bulletin of the Willard Storage Battery Company, no. 136. I cannot tell what year that was put out. A battery for use in connection with a tractor or truck may in some types of truck and tractor service require a more rugged construction

than a battery used on or in connection with an automobile. I don't know whether motor boats require the same duty of a battery that is required in its use in an automobile.

The batteries used on automobiles generally during the years '22, '23, '24, '25, and '26 were our SJ types, C types, SL types. The SJ is those types referring to the plate used in that battery. It refers to the height of the plates. They all refer to the plates, size of the plates. That designation has been followed from year to year. It is my understanding that during those years a 13-plate SJ battery would be designated as SJ-4. An 11-plate battery would be SJ-3. During those years the number of cells was usually three or six; the number of plates might vary from seven up to twenty-one per cell.

Q. How did you designate batteries used on or in connection with automobile trucks or automobile wagons?

A. All of those batteries regardless of the use, were given the same designation.

73 (Narrative:) They had the same number of plates. The plates were of the same thickness for the same type of battery. The battery was of the same general construction and design. In some cases a truck requires the same duty of a battery as an automobile does, where they are used for the same purpose, that is, the same kind of truck. A heavy-duty truck may or may not require the size, type, and number of plates in the battery, depending upon the electrical system on the truck. A 6-volt battery is usually used on a motorcycle. That is a smaller size than exhibit 1. The plate compositions are the same. The sizes of the plates are not the same. The number may be the same.

Batteries similar to plaintiff's exhibit 1 are used as original equipment in automobiles by automobile manufacturers. I know some makes of cars that are using Willard batteries. Studebaker, Reo, and Oldsmobile, Hupmobile, are a few of them.

As chief engineer for the Willard people I do not design and build batteries for submarine purposes. I design and build them for lighting plants. We don't build any that I know of personally for original equipment of lighting plants; they are all for replacement in light plants. Some of those batteries are contained in glass jar containers. Sometimes we supply a battery similar to plaintiff's exhibit 1. Willard batteries were used as original equipment in trucks. They are used in the White, but I don't recall any others at the present time. We have made batteries for Ford. His trucks may or may not be equipped with our batteries. In some cases the Ford car is equipped with our battery as original equipment. We furnish batteries as original equipment on motorcycles. I would consider an ambulance as an automobile.

Theodore A. Willard, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Nomis:

I am a director of the Willard Storage Battery Company, which was incorporated in 1902. That was the result of incorporation of a partnership known as Sipe & Sigler, of which I was a partner, and that partnership was formed about 1898.

74 I first began building electric storage batteries in a commercial way in 1895. The first batteries were used by physicians, the next batteries were used by Edison phonographs, followed by batteries for Western Union Telegraph Company, fire alarm signal systems, and on down in many uses; in fact, a battery is used in any place where stored energy is required in their multitudinous uses. There are too many to think of now, but we went on into train lighting and then on into the automobile, electric automobile, and then automobile lighting, lighting and starting. As we manufactured and sold for one field we would continue to manufacture and sell for another field.

The catalogue handed me is one issued by Sipe & Sigler in 1901. (Catalogue last referred to marked "Plaintiff's Exhibit 3.")

From the time we first began building electric storage batteries up until the present time, there were no differences in the constituent parts of the storage battery. Whatever changes were made in the storage battery were due to requirements of different voltage and different capacity, but the essential parts were always the same. There has been no refinement in the manufacture except to bring the cost down, certain developments, lowering prices in competition.

(Plaintiff's exhibit 3, particular attention being called to page 25, offered and received in evidence and is attached hereto and made a part hereof.)

Cross-examination by Mr. McMahon:

The essential parts of the battery manufactured in 1895 for use by physicians, in connection with phonographs, Western Union, and fire alarms, were always the same as plaintiff's exhibit 1; batteries have never changed much. By "essential parts" I mean the plates and the separators and the containers, connectors, vent plugs, and so forth. We did not use the same hard-rubber container in the batteries manufactured in 1895 as used in plaintiff's exhibit 1. We used practically the same vent plug and the same intercell

75 connector. I couldn't give you a date as to when the change in the connector as shown in plaintiff's exhibit 2 was made. My memory fails me on that. We manufactured batteries of various cells, among which were six; three-cell batteries, six-cell batteries, and so forth. There wasn't any such thing as batteries for use in starting automobiles in 1895. The battery may have been used with stationary engines; batteries were used for ignition in stationary engines. The size of those batteries was about the same as an automobile battery, starting and lighting battery today, about six cell. I couldn't answer the question whether the batteries manu-

factured by us in 1905 contained the same number and size of plates found in plaintiff's exhibit 1. They at first contained the number of plates necessary to do the work, to give them capacity enough to do what they were required to do; but as to the exact number I don't know. By "constituent parts" I referred to the detailed parts of a battery, that is, the connectors, vent plugs, and plates, and separators, and those things are, you might say, the details, the detailed parts of a battery. That does not refer to the size of the plate area. It refers to the parts of the battery. All batteries practically have the same parts. I would say the base materials going into the construction of those parts of a battery were the same. Batteries have never changed in that regard.

We started manufacturing batteries for use in starting automobiles about 1908. There was a gradual, you might say fluctuating increase for several years; some periods of time, the development would lie, as far as sales were concerned, quite rapid, and at other times slow. In 1908 we started using batteries in connection with automobiles for lighting purposes, and in 1911 we started making them for starting and lighting and ignition. We did not make a 12-cell or 24 volt battery used by the Cadillac people in 1911. We started supplying batteries for use as original equipment of automobiles and automobile trucks about the same date, about 1908, and '11. There hasn't been any decided changes made that I know of in the design and construction of electric storage batteries between 1908 and 1926. There has been a gradual cutting down of the amount of materials due to competition, and due to the fact that cars didn't have as heavy requirements. By cars I mean automobiles.

76 Q. Would you say that the advent of the automobile was directly responsible for the changes in refinement in the design and manufacture of a battery since 1908?

A. No; that would have taken place in any event.

Q. You think that the other uses would have been sufficient to have required it?

A. Yes.

Q. What is your greatest user of electric storage batteries of the type identified here as Plaintiff's Exhibit 1?

A. Starting and lighting.

Q. Starting and lighting on what?

A. Automobiles.

(Narrative continued:) We build batteries for use on submarines only in an experimental way. We build batteries for propulsion purposes on industrial tractors. I couldn't give you the details of the industrial tractor batteries, only that the plates were the same as used for automobile starting and lighting. I think they were most all six-volt batteries, but I am not sure of that. I think the size of the cells depended upon the requirements. I couldn't say as to that; I have forgotten as to that. All automobiles do not require the same size or type of a battery. An automobile with a very large

engine requires more plates in the elements of the battery working at the same voltage, six volts. The wide range of batteries used in connection with automobiles as to size and dimensions is due to the size of the engine and the size of the car and the necessary power required to crank the engine. The sizes of those variations are determined by the manufacturer of the automobile. That would apply also to different types of automobiles.

Robert J. Nightingale, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am vice president in charge of manufacturers' sales of the Willard Storage Battery Company, and have been in the employ of that company since December 21, 1908, as manager of wholesale sales.

77 In the course of my duties I have to do with the making of contracts for the sale of storage batteries to manufacturers of automobiles.

When an automobile manufacturer designs a car or changes the present design, he inquires as to the size of battery that will meet the requirements set forth in the test. That may be dependent on the cranking of the motor or other uses to which the battery is to be put, and the additional load also is taken into consideration, such as in modern automobiles.

Q. In other words, in any contract in any sale of storage batteries to automobile manufacturers by the Willard Storage Battery Company, did your company ever receive drawings or specifications of a battery to be built by you? Or, on the contrary, did you select the battery which met the requirements and then bid on it and submitted that to the manufacturer.

A. We are always asked to select the battery that will perform the duty.

Q. So that the entire criterion is the duty required?

A. The duty required by the automobile.

Q. So that the automobile manufacturer adjusted his automobile to the storage battery?

A. Both as to size and as to location.

Cross-examination by Mr. MCMAHON:

All of the batteries we sell as original equipment in automobiles do not possess the same number of plates or the same thickness of plates. There is no classification of the batteries manufactured by Willard as to the class of automobiles which we are supplying under our contract, make of automobiles. All makes of automobiles do not require the same designated battery type or size. All makes required different sizes.

Defendant's exhibit A is Bulletin 136. I cannot place the time that that bulletin was issued. I don't have to do with booklets.

78 Carl T. Klug, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am in the employ of the Willard Storage Battery Company and have been employed since 1914. I am in charge of the original equipment sales promotion of the Willard Storage Battery Company, under Mr. Nightingale, assistant sales manager.

Plaintiff's exhibits 4, 5, 6, 7, 8, and 9 represent storage batteries manufactured by the Willard Storage Battery Company beginning about 1914 and extending through the year 1922.

We sold many of the same standard SLI batteries to concerns manufacturing different types of machinery other than automobiles. Amongst those we have road building machinery, such as the Acme Manufacturing Company, of Frankfort, New York; the Ames Iron Works, of Oswego, New York, who built a road roller which was equipped with a starter and storage battery; and we also sold considerable quantities to marine motor manufacturers—Sterling Engine Company of Buffalo, the Standard Motor Construction Company of Jersey City, Red Wing Motor Company of Red Wing, Minnesota; the Gray Marine Motor Company of Detroit; in fact, I can give you twenty to twenty-five names in that class if you desire. That applies generally to the sales during the period 1922 to 1926. I don't know as I can state specifically those particular dates, but we did business with those concerns continuously almost from 1916 up to date, provided, of course, if they still remain in business. Some of them passed out of the picture. We also sold a good many to tractor concerns. Amongst those the Caterpiller Tractor Company, Peoria; Cleveland Tractor Company in Cleveland. There is one that sticks out particularly in my mind—the Moline Plow Company. We sold them one year ten thousand batteries of the standard SLI type to start the engine of the tractor. We also had gasoline shovels—the Thew Shovel Company, the General Excavator Company of Moline; Moline Steamshovel Company,
79 and people of that class. Stationary engines—Beaver Manufacturing Company—in fact, there were many, many uses where the equipment was not of the automobile type. There was one other concern, too, I remember quite distinctly——

The COURT. Now, you have given the court just five, and you say there are many, many. I would like to know if it is true about additional types of uses. You have given me now road building machine manufacturers, marine motors, tractors, gas shovels, stationary engines.

The WITNESS. Gasoline shovels, gasoline cranes.

The COURT. That all comes under that heading of excavating machines.

A. (Continuing.) There are, of course, many manufacturers under each one of those divisions, so that the actual number of batteries used would be quite substantial. There is also harvesting machinery. I remember one concern whom we solicited for battery business who built a small independent harvester—The Gleaner Combined Har-

vester Company, of Kansas City. They built a small harvesting machine which the individual farmer would buy. We solicited its battery business but were not successful in getting it, because it was the experience of this concern in selling this harvester to a farmer he would much prefer to take the battery out of his automobile and put it in his harvester machine rather than buy a battery for his machine. This was quite logical because the harvesting season was short; he would use the battery for two or three months during the harvesting season, whereas the battery would spoil over a long standing period over the winter.

Q. Are there any other uses, other than incidental, of the types of batteries adapted for use in automobiles, which you have sold or seen installed or seen in use in other fields other than the ones you have related just now?

A. I have seen them operating door bells; I have seen them on radios; I have seen them used for telegraph work; I have seen them used in laboratory testing work of various kinds, numerous instances of that kind in the laboratory; I have seen them on—in fact, so in any place where electricity of a portable form is desired there has been a battery used.

Q. Mr. Klug, you have taken the same battery out of various services for the purpose of presenting to the court for this trial?

A. Quite true.

(Narrative continued:) Plaintiff's exhibit 10 is a 12-volt type of battery that was adaptable for and commonly used on a Dodge car from the years 1917 to possibly '24 or '25. That particular battery I myself picked up from a Kohler lighting system in service in the Beaver Falls high school in Beaver Falls, Pennsylvania. It had been in service there for approximately since January '29. The photograph, also marked "Plaintiff's Exhibit 10", is identically the same battery. That battery was picked out of a Dodge automobile of about 1917 vintage, that belonged to Miss Florence Page, of Euclid Avenue, Willoughby, Ohio. It had been in service in that car since September 1928.

Cross-examination by Mr. McMahon:

The batteries supplied for use in connection with road-building machinery, were the SJR types, a similar type as put in the Studebaker car. This road-building machinery I speak of consists of a road leveler or a ditch digger, some device of that kind used in repairing or laying new roads, whereby the machine itself is transported from place to place through the assistance of the gasoline motor, whereby the operation of the machine in its particular function is also driven by this gasoline motor; that is to say, the machine may be moved from place to place under its own motive power, and when at that place it would be used, the same motor would be used, to drive the machine. That applies particularly to a concrete-mixing machine, which is also one of further uses. The use of that battery

is for starting, lighting, and ignition on this engine used in this machine. A road-building machine might be classed as a tractor. A gas shovel is a shovel that is operated by gasoline motor instead of a steam engine. The battery is used in that for starting, lighting, and ignition purposes on the gasoline motor. The excavator, I think, would be classed as construction machinery in the building trade. A road roller is used to roll a road. I don't know as
81 you can say that is similar to a tractor. That is a piece of machinery of a specific kind.

As to all of these movable machines, such as road-building machinery, tractors, gas shovels, and excavators and road rollers, the propulsion power there, internal combustion engine, is of the same duty requirements, so far as the battery is concerned, as those found on a Studebaker; if the engine was of similar size, it would probably require the same electrical characteristics to start it. If the tests had shown that the requirements necessary were such that it needed a larger battery, we would furnish a larger battery. The same type of battery was removed from a car to the lighting. I said it could have been interchangeable. I said this concern sold a harvesting machine. We tried to get their battery business but could not.

Alfred E. Harrold, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am in the employ of the Willard Storage Battery Company as manager of stationary and railway sales. I have been in the employ of the company since December 8, 1914. My duty is the promotion of sales with relation to stationary engines and railway equipment and other similar fields, for purposes other than use on automobiles. It is not confined to stationary engines; anything except automobiles.

During the taxable years 1922 to 1926, confining my testimony to storage batteries of the type adapted to and used on automobiles, automobile trucks, and automobile wagons, during that period I remember of selling batteries of this type to the American Steel & Wire Company for operating emergency engine stock, for one purpose; also the same company purchased batteries of that kind for operating telephone systems in their plant. The Townley Company, of Muscatine, Iowa, has purchased batteries of that kind for operating calliopes. The East St. Louis Lighting & Power Com-
82 pany at East St. Louis used batteries for oil circuit breaker and control operation; the Dayton Power & Light Company used batteries for the same purpose; the laboratories at Nela Park used batteries for operating potentiometers, microferometers, and micrometer calipers, and for the testing of vacuum tubes and some incandescent lamp test, and also photometric use on lamps. Mr. F. B. Stearns, of the city here, purchased batteries of that type for use on two of his yachts—the "Carmento"—I can't recall the name of

the other yacht; Mr. E. H. Scott, of Erie, Pennsylvania, purchased the same type of battery for use on his boat. Mr. Henry B. Joy, of Detroit, is another customer using them on boats. The Ringling Brothers and Sells-Floto Circus use them in connection with lighting plants for furnishing lights and also for operating kitchen utensils in their camps. Earlier than that I remember the same thing among other operators, but don't recall during 1922–26. For instance, industrial trucks, vehicles, mine locomotives, and work of that character. There have been many of them used on the isolated lighting plants, similar to the Delco, and other uses. I sold them for train lighting and for railroad signals, also for circuit-breaker operation for the Pennsylvania Railroad Company. Sound batteries are used in theaters in connection with any sound pictures. That use I don't believe—I don't know whether that started prior to 1929 or not. Steamship companies used them for emergency lighting and for radio power; they also used them for their intercommunicating telephone systems on board; in fact, for any emergency source of power, in case of the failure of their main power supply they fell back on batteries—telephone bells, enunciators, steering apparatus, compass and rudder indicator, kitchen cooking—galley apparatus they call it. The Interlake Steamship Company and Pioneer Steamship Company used them for operating their fog horns. I am not familiar with sales to the United States Government, the Army and Navy. Other uses were the police and fire alarm systems, city of Cleveland; they have used batteries for that purpose, as well as other cities. Telephone companies, Western Electric, the Associated Bell Telephone Companies, that includes. In Nela Park they use batteries in an experimental way, I know, for electric welding of the filament and the lead-in wires in the lamps. Telegraph, Western
83 Union Telegraph Company use them for regular operation and also for emergency battery supply. I don't recall any railroad switches. I don't recall any sewing machines. Dental engines, though, dental drills. I have sold them for pyrometers—use batteries for that purpose, heat regulating devices. Haulage in mines would be the mine locomotive I spoke of. I don't recall selling any for miners' lamps. Ignition in various kinds of stationary engines is one of the main purposes of batteries on isolated lighting plants, or any stationary gas engine or diesel engine, semidiesel type, any kind of an internal combustion engine. They were used in connection with radio. Broadcasting stations use them in transmitting as well as receiving sets; that is not for emergency purpose but for power supply. That was their regular source of supply during that period, and still is. Ventilating systems on ships—fans, is part of the main emergency requirements on board ships. In other words, if the main power fails the battery is connected to the main buss bars and carries whatever load is on the ship. Any place where power is used on a ship may require the use of the battery. Heating apparatus on a boat that would generally come in connection with

kitchen apparatus and galley accessories. Electric winches on ships used for hoisting, also bilge pumps, winches, or hoists. I have mentioned oil switches on power plants, control buss; that is the same thing. I haven't sold any for crossing signals in connection with railways, personally. I have sold them for train lighting. They are used for draw bridges, but I haven't sold them. In moving-picture machines, that is sound-projection work, as we call it. Electric hoists. For example, Henry B. Joy's yacht, it was used for operating his hoist. They don't use a separate battery for each of these purposes; the one battery supplies for all those purposes. I can't think of any other uses. That selling was all over the United States, through our dealers and by myself personally. I couldn't give any accurate number of such sales.

The COURT. Have you any idea of the proportion that they bear to your total battery sales?

The WITNESS. I would say it was a good proportion of the
84 sales, although it is not as large as the sale for automotive purposes. Of course that is a big field. But I would say they are sold generally throughout the whole United States by our sales organization for that purpose. That has been going on ever since I have been connected with the company.

Cross-examination by Mr. McMAHON:

The batteries used for the various purposes I mentioned requires every size and type the Willard Company have ever made. Simply take a battery that is suited to the load and apply it to that purpose. My answer is limited to the sizes and types used on automobiles. It includes the size, but it is not limited to that.

I cannot give the total number of sales made for each of the purposes mentioned during the taxable period, June 1922, to and including February 1926, inclusive. I just recall that I made sales, but I don't know the number. I am speaking of thousands of sales, thousands and thousands. I cannot bring to this court a compilation showing all of the batteries sold for each of all of the uses I have mentioned. I have no record.

I have a general idea of the sizes of batteries used in connection with automobiles, automobile trucks, and so forth. I have to do with the sales for other purposes besides automobiles. I don't sell them for use on automobiles.

I don't know whether any of the batteries which we sold for other purposes of the sizes and types required for use on automobiles were subjected to tax during the taxable period, June 1922 to February 1926, inclusive.

Redirect examination by Mr. NORRIS:

I can't produce records of the figures of each individual sale because we haven't been keeping records of that kind four or five years, in some cases three years. We destroy records around four to five years old.

Recross-examination by Mr. McMAHON:

Q. In making those sales for uses other than on automobiles, did you make any of those sales for uses—I mean for use as original equipment on any of the list of purposes or uses you mentioned?

The COURT. For instance, in a gas engine, when it was put out did it have a battery in it?

A. No; most of these were replacement battery sales. Well, original equipment might cover oil circuit breakers, yes; but that is something used by itself; it is not in the sense of electrical equipment of a battery on an automobile. It might have been the first battery that they bought for that purpose. In that sense it is original equipment. But I don't think that is your meaning of the word original equipment.

Q. My meaning of the words "original equipment" would be anything sold in connection with the machine or object at the time the object is purchased.

A. Most of these were purchased by the consumer of the article and not purchased for resale.

Mr. Mahon. That is all.

Edwin M. Sutherland, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am the manager of industrial sales of the Willard Storage Battery Company and have been in the employ of that company since 1919. As such manager of industrial sales my duties are the application of storage batteries for any use whatsoever.

I haven't been here since the court has been in session and heard all the testimony, but endeavoring to avoid repeating the uses which I have heard other witnesses testify to and confining my answers to the type of storage batteries applicable for use on automobiles, automobile trucks, and automobile wagons during the period from 1922 to 1926, I have sold batteries, placed batteries upon tractors.

That has been mentioned, I believe. Batteries of that type have been sold for manhole lighting, portable battery. I have seen them sold, seen them used, and sold on Christmas-tree lighting; they have been used in college laboratories, testing laboratories, batteries of the type you have mentioned. They have been used in the cabs of railway cars; they have been used for ignition on speedsters on the railways; I have seen them used for ignition, hot-coil ignition on diesel engines—referring to Fairbanks-Morse.

Q. Making sales for these purposes, were the types of batteries as to which you were testifying equally as well adapted for these other uses as for use in automobiles?

Mr. McMAHON. The Government objects to that question because it calls for the conclusion of the witness, and there is no limitation to the question itself.

The COURT. Overruled.

Mr. McMANON. Exception. The Government also wishes to object on the ground the witness has not shown himself qualified to answer as a technical expert.

The COURT. Answer the question.

Mr. McMANON. Exception.

A. They are equally adapted. In further explanation of my work, we receive a request or an inquiry for an application, we take the requirements of that application, and we take any storage battery which we may have, whether it be automotive or this type, whichever you are talking about, and apply it to the electrical requirements of that system.

(Narrative continued:) I know of the use of storage batteries in connection with radios, radio receiving sets, during this period. The radio receiving sets came into existence, with reference to
87 popular use of it, in 1922, I would say. Radio receiving sets used storage batteries until the production of the A.C. set, I would say in 1927 or '28, first started in. The selling to radio receiving sets was not in my field, although I have done some of that work.

During the years '22 to '26 this type of batteries have been sold quite materially for use on tow boats, especially in semi Diesel equipped tow boats. I remember one sale in St. Louis on a Fairbanks Morse engine, type SJRR, where it was used. That is a type which is normally used on Pierce Arrow equipment.

I worked in an experimental capacity first in putting batteries, of the type common and generally sold and used on automobiles or automobile trucks, on a Renault French tank at the Northeast Plant in Rochester, N.Y., developing the mounting and placing the battery therein.

Concerning pneumatic tools, the Chicago Pneumatic Tool Company has used Willard batteries of that type for a number of years in conjunction with their compressor engines. It would be used as ignition and starting.

I have a recollection as to the quantity used in tractor sales. There were nine thousand, or a little over nine thousand sold to the Moline Universal Tractor Company. That is the same ten thousand Mr. Klug testified to. That was in one year, 1918 and '19. The type of battery sold to the Moline Plow Company was SJR-3 automotive type, six volts. That is a number of years ago, but I believe Brisco people used that same type.

I couldn't give the quantities sold for time clock installation, although sales were made to the International Time Recorder people. Depth sounding devices were not in production at that time, although it is in quit extensive use at the present time. At the present time the type of battery now used for automobile and automobile wagons is the same type used in depth sounding devices. The same types were used in compressors. The types that were applicable and were used in automobiles and automobile wagons in 1922 to '26 were sold

for use upon compressors. I cannot recollect the particular types, although I remember selling and did sell the Chicago Pneumatic Tool Company quite a lot of stuff

Street sweepers was a straight automotive equipment, six volt battery. Traffic signals I am not familiar with.

These sales for these particular purposes were generally throughout the United States.

Cross-examination by Mr. McManus.

I would not be able to tell the number of batteries we sold for each of the specific purposes I mentioned. The batteries mentioned as being sold for tractors, railway speeders, and so forth, in connection with internal combustion engines, were used in those articles or equipment. Part of the batteries I have sold have been for use on in connection with internal combustion engines. I wouldn't say all of the other parts have been used in connection with motors of various electromotive devices. The electromotive devices would have to be explained.

The Court. The court understands that. You don't need to go into that, for instance, a time clock or street sweeper, and so forth.

Mr. McManus. A street sweeper passes a gasoline engine, so it has two general uses, is what I was seeking to show.

(Narrative continued.) The use of batteries on or in connection with the tractor, street sweeper, and so forth, contemplate starting, lighting and ignition purposes.

I didn't refer to mine locomotives.

When I spoke about Pusel engines, and a hot coil, that means they heat the mixture first by means of an electric coil so that it will fire.

M. J. Brennan, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Nomms.

I am employed by the Willard Storage Battery Company as wholesale salesman. I have been in the employ of that company since March 20, 1913. My duties are the selling of storage batteries to manufacturers of various equipments, including automobiles, tractors and marine engines, industrial equipment, and so forth.

Referring to sales of storage batteries during the period 1922 to 1926 of the type adaptable for use and used on automobiles and automobile wagons, practically all the various equipments have been mentioned, but there is the train control equipment. I have sold batteries of that type to the Tesla Company, who made an automatic stopping device for passenger trains, trains of all kinds, in fact, for the railroads. I couldn't give you the quantity. We also sold batteries for Snow Motor Company, a special piece of equipment that was used in the snow country for load operation; and sold batteries for electric welding, six volt batteries carbon welding on metal at that time. All various marine engines and engines that were used

for drilling purposes, where it was just an internal combustion engine but it might be used for mostly any class of work that called for that particular type of engine. I also sold Tecla Company. I mentioned Caterpillar Tractor, for use in caterpillar tractors. The Snow Motor Company, they are since out of business; and all of the marine engine companies, such as Griffith Manufacturing Company, Scripps Motor Company, Wisconsin Engine Company, Hinkley Motor, Stearns Motor Manufacturing Company, Luddington, Michigan, the DeFoe Boat Motor Works, Bay City; Belle Isle Boat & Engine Company, Chris Smith & Son, the Mayo Boat & Airplane Works at Port Huron, Michigan, for use in airplanes. They never really got into the production of airplanes, but that is the name of the company. Their biggest activity is the manufacture of boats, but they did assemble a plane at one time, and one battery would be sold them at that particular time. They are now manufacturing boats. And we sold considerable quantities of batteries to the outboard people for use on outboard motors, at Milwaukee; the Johnson Motor Company at Waukegan, Illinois, the Carlle Motor at Detroit. The Carlle Motor incidentally used storage batteries in some cases for electrically operated weighing machines, and that sort of thing. They make a cable right now. They had special devices they used the batteries on. I remember the Kermath Manufacturing Company. They made marine engines. I remember the Red Wing Motor Company, of Red Wing, Minnesota, which also made marine engines. The Regal Gasoline Engine Company at Coldwater make marine engines in heavy duty type as well as the light type. They also manufacture a lighting plant for which we sold them batteries, the same type of batteries we have, the SLI type of battery for lighting plant equipment. "SLI" means starting, lighting, and ignition. I remember the Wisconsin Motor Manufacturing Company. They manufacture engines for all purposes, not only marine but for some of them are used in tractors, some of them are used in road building machinery. I also remember the Dodge Detroit Steam Motors Company, which manufactured a steam automobile. Didn't get very far. I remember the H. P. Dodge Motor Works, of Detroit, Michigan, very well. They manufacture a boat in which they used engines that were manufactured by others, such as the Lycoming people. They manufactured the boat and purchased the battery for the boat from us. I remember the Gray Motor Company, of Detroit, Michigan. They don't manufacture but they convert automotive types of engines, internal combustion engines of various makes to marine purposes and then sell them as marine engines. The Hinkley Motors Corporation manufacture a marine engine. The Hacker Boat Company, of Mt. Clemens, manufacture boats; they don't manufacture marine engines. They use storage batteries for the SLI regular on the various boats they build. The Buda Company, of Harvey, Illinois, manufacture a line of engines for all purposes as well—marine, trucks, taxicabs,

for road building machinery—the same types of batteries sold to them. The Caille Brothers, of Detroit, Michigan, is a company manufacturing outboard motors, and also recently manufactured an inboard motor, and scales and weighing machines. I refer to inboard and outboard motors with reference to boats. I also sold the Chriscraft Company, manufacturers of boats and also of their own marine engines. The Scripps Company are manufacturers of marine engines; I sold to them, in connection with starting and lighting, starting and ignition of their engine. No lighting, unless the boats they were applied on, or were on, the boats they were installed
91 on by the customers on the engine would have lights, and naturally they would use the same battery. We have had other boat manufacturers since 1915 when I was in Detroit, Michigan, that we sold to, and naturally some of them didn't make a go of it. They were in business for several years and they were out. The Stearn people at Luddington passed out, but they were very active back in 1920, '21, '22, and '23; and there are others that I probably don't recall right now that we sold to that I have not mentioned.

In other years other than 1921 to '26 which I have mentioned, we always sold the type of storage batteries which were then adapted for use and were used in automobiles and automobile trucks and wagons. We just ascertained the size of the engine and what was going to be required of the battery and picked the battery from our list that we make and furnished that battery, whether it was 80 ampere hour capacity or 100, whatever it required. I cannot definitely give any idea as to the quantities of these types of storage batteries sold to any one or all of these concerns for other purposes than automobiles; accumulative. I couldn't quite give it in figures and know that I was right. We don't retain our records beyond three years back.

Q. Remember the court can form no idea of volume. Can you give any correct idea?

Mr. McMANON. Just a minute; the Government objects to that because that calls for a conclusion or a guess on the part of the witness.

The COURT. Overruled. Give me your best idea, not merely a guess—your honest estimate.

The WITNESS. An approximation of seven thousand batteries, eight thousand batteries going to the outboard manufacturers alone last year.

The COURT. Not last year. We are not talking about last year, Mr. Brennan.

The WITNESS. I see.

92 Mr. NORRIS. This is during the period between '22 and '26.

The WITNESS. I couldn't, unless—the total of five years?

Q. I don't care whether it is one year or in all. The court doesn't know whether you sold one battery to one person or whether there were—if you could give some idea of an honest approximation?

A. Just that it was thousands of batteries per year.

(Narrative continued:) I could venture a guess. I haven't any idea what the company did, what our department as a whole. As to our own sales that we made to any one or all of them during the period 1922 to '26, I would say one thousand, fifteen hundred batteries on an average for each of the small boat manufacturers, per year.

We furnished batteries for boats designed particularly for racing during the years '22 to '26. I don't recall any batteries definitely which were furnished as original equipment for speed boats or boats of that character during those years. There probably were.

Q. Mr. Brennan, I show you a photograph marked "Plaintiff's exhibit 11", which is a photograph of this particular battery, and ask you what you know of that particular battery?

A. That particular battery I took out of a lighting plant set. That was a Phillips lighting set, property of Mr. Charles Sleicher, at Philadelphia.

Q. What is a WS-113 type battery?

A. Yes.

Mr. Osmun. Your Honor, we move this testimony be stricken out, as it is not one of the types of batteries involved in this tax action; therefore any testimony is irrelevant and incompetent.

Mr. Norris. I propose to show that this battery is the same battery, subject perhaps to refinement in the art of manufacture, which was manufactured and sold in the period 1922 to '26 for use in automobiles. The life of a battery is so short we can't take a battery which was in use even as late as 1926 and produce it now.

The Court. Overruled.

93 Mr. Osmun. Exception.

Q. I show you a photograph marked "Plaintiff's Exhibit 12", a photograph of a battery produced in court; that also is a WS-113 type battery?

Mr. Osmun. Same objection.

The Court. Overruled.

Mr. Osmun. Exception.

A. Yes.

Q. Where did you get that particular battery?

Mr. Osmun. Same objection.

The Court. Overruled.

Mr. Osmun. Exception.

A. I took that battery out of a Pontiac coupe car.

(Narrative continued:) The battery here produced in court (plaintiff's exhibit 13) is a JRR-26, 12-volt battery. That is a type battery sold during the period 1922 to '26. It was sold for use on marine engines, for automobiles, for various uses where 12-volt battery was demanded. I took this battery from a boat that was powered with an Evinrude 25-horsepower engine. The other battery (plaintiff's exhibit 14) produced, is one used in connection with

an Elto Quad outboard motor, type JRR 26. That was a battery that we furnished to the Dodge automobile. It was the battery I sold to the Caille Outboard Motor. The battery was sold for various 12-volt purposes, and they wanted a low volt battery of that capacity. That was the same battery manufactured and sold during the period 1922 to 26.

(Photographs of said batteries marked "Plaintiff's Exhibits 13 and 14".)

94 Cross examination by Mr. McMahon:

The figures of one thousand to fifteen hundred a year, which I gave as the number of batteries of this type used in automobiles, sold to boat manufacturers, in a year, is just a guess. I have no way of knowing how close I am. I don't mean to convey the impression that I sold to all the boat manufacturers in the United States. I sold to just the specific boat manufacturers that have been mentioned here. Prior to that time batteries of those types had been used in automobiles of the same sizes and types that I sold to boat manufacturers.

The Stearns Manufacturing Company of Ludington, Michigan, is not the automobile company. They manufacture marine engines or isolated plant equipment.

We sell to manufacturers of all kinds. I can give you no idea as to how many batteries we sold per year to all the automobile manufacturers that we supplied the batteries for in original equipment. We had nothing to do with orders received at all. We just merely contract the manufacturer for his entire requirements. We very, very seldom come in contact with the actual purchase orders, so I have no idea of their quantity shipped direct to them. We contract merely to supply them the number of batteries that they demand from us for the period of a year, the types of the batteries that are necessary or qualified to do their work. I can't give you an idea of how many batteries we supplied to manufacturers of automobile trucks, automobile wagons, automobiles, and so forth but our catalogues will give you an idea of the types and the kind of batteries. Defendant's exhibit A is one of the catalogues at that time. We have always had bulletins, before and after this time, or books or some sort of information from which to select batteries. Defendant's exhibit A does not give a list of the automobile companies that we supplied these batteries on as original equipment.

Defendant's exhibit B is apparently a photostat copy of an advertisement of Willard, and it contains at least a partial list of manufacturers to whom we supplied batteries.

95 Defendant's exhibit C is just a copy of another ad, apparently, and contains a partial list of the manufacturers to whom we supplied batteries. I wouldn't be qualified to give you a complete list of the manufacturers of automobiles to whom we supplied batteries as original equipment during June 22 to February, 1926. I contracted for them, but not all of them, only in the

territory in which I worked, and then I am only one of them in there. I presume Mr. Nightingale could supply that information.

Howard C. Negus, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Norris:

My name is Howard C. Negus. I am sales promotion manager of the Willard Storage Battery Company.

Q. Without repeating the uses which you have heard testified to this afternoon, will you be good enough to state other uses of which you know, and as to which you have made sales, of the types of batteries adapted by and used on automobiles between 1922 and 1926?

Mr. McMahon. I think maybe the Government can save some time in this respect. The Government concedes that batteries of the sizes and types used on or in connection with automobiles may be used on or in connection with all internal combustion engines where the duty to be performed is the same as the duty to be performed in the automobile, with respect to starting, lighting, and ignition.

Mr. Norris. Do I understand that you say were used?

Mr. McMahon. I said may be used.

Mr. Norris. Well, the burden is on us to prove they were used. I will take that admission for what it is worth.

96 Mr. McMahon. I could shorten it up for you to that extent.

Q. Will you answer the question?

A. We sold batteries for gasoline logging machines, both rail and portable on skids; sold batteries on speed boats; on power carrier telephones; on portable Western Electric public address systems; for filament supply on remote control panels for broadcasting stations; for hydraulic pumping on barges for pumping water into ponds. Those are all I think of at the present time.

(Narrative continued:) These sales, understand, were made while I was on the Pacific coast, and it so happens those records were destroyed. In some cases the sale of batteries ran over into the hundreds. In the cases of marine boat work, for fishing boats and things of that kind, it ran into several hundred, over a period of three years.

For fire department lighting we have sold the portable type of light which is used at the fire, in which a light is mounted on a handle. That is of this particular type of batteries in this period. We also sold them for a system which is used for sending photographs by wire, such as newspapers use; I sold a set to the Oregon Journal. That was in 1926; I couldn't give the exact month. We have sold them for use in Custer amusement-park cars, and for use in small quantities in toy trains.

I operated a service station for the company from 1925 up until a year ago, 1928, in Portland, Oregon. Service batteries are batteries of sizes suitable for use in automobiles or on radios which are loaned out to customers at a given rate per day. Ordinarily we use the type

which is used in an automobile. Of course there would be various sizes; and those were used both for marine and radio and automobile rental purposes.

Cross-examination by Mr. McMahon:

We sold batteries which we advertised or designated as radio batteries while I was running the service station between 1922 and 1926. Whether such battery is the same as used on automobiles, as far as sizes of plates, thickness of plates, and everything else connected with it is concerned, it depends entirely upon whether
97 it is an A battery or filament battery or B battery. The B battery is an entirely different kind of proposition. We sold two capacities, but they were both radio batteries and designated as such.

Redirect examination by Mr. Norris:

I am familiar with the construction of the radio batteries I have been describing. They have the same plates, the same material throughout as the types used in automobiles; that is; for "A" purposes. They were the SLI battery dressed up and called special radio battery. I don't know the history of the manufacture of the special radio battery by Willard.

Recross-examination by Mr. McMahon:

By the "same plates" I mean the same material, same thickness, same size, same plate area. I have taken down one of these radio batteries. It has the same types of plates. As to being the same number, it depends entirely upon the capacity, the size of the battery. You can use an A battery to start an automobile, but not a B battery. A B battery is a high voltage, high capacity battery. An automobile battery is a low voltage, high capacity battery. In other words, you have a multiplicity of cells in a B battery. The difference in construction between the two batteries that would produce that high and low voltage is just a question of number of plates and number of cells, not necessarily the thickness of the plates; the plate area.

Frank Denzel, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Norris:

My name is Frank Denzel. I am proprietor of the Denzel Electric Company of Cleveland. At the present time my business is
98 electrical contractor and dealer. In 1902 I manufactured electric storage batteries with my brother. We manufactured a battery very similar to those made by the Willard Storage Battery Company, and manufactured principally from their plates. Thereafter we sold batteries of the Willard Storage Battery Company. At the time that the supply of plates ran out that we had purchased in wholesale quantity, at the time that those plates were consumed, then we began to buy separate batteries off the Willard Storage Battery Company, which I should say was about 1905 or '06, perhaps.

We sold those batteries for a good many of the purposes we have heard here today, and some other uses that have not been mentioned. One of the most important ones perhaps was the use of carriage lighting. That was a more extensive business at that time than we perhaps realize now. We had concerns who built coaches, hearses, and ambulances and equipped them with electric light, and we supplied them with the batteries for those hearses and coaches. One of those customers was the Riddle Coach & Hearse Company, of Ravenna, Ohio. Those were Willard make batteries. Another use the batteries were put to, and one even more important, perhaps, in quantity at least, was the use of car signals, electric car signals. We sold those batteries through the Lintern Car Signal Company in Cleveland, to the interurban lines through the eastern half of the United States. They were used for denoting the tail light independent of the trolley wire. In other words, if the trolley came off the tail light remained burning. We sold those batteries from 1902, perhaps, to '07 and '08, or even perhaps a little later than that. In a comparative way I have a recollection as to sales of quantities of batteries of that character. I don't know as I could specify the exact number of batteries sold that way. They were sold through the Newark Company to the interurban lines, to the Cleveland & Southwestern.

The COURT. These sales are previous years so far.

Mr. NORRIS. I consider it my duty to show this was a commercial commodity away back in 1893, and continued uninterruptedly to be a commercial commodity.

99 The COURT. Well, perhaps on that theory. But you must show that these uses continued during the periods involved, I think.

Mr. McMAHON. Or exactly the same batteries without change.

Mr. NORRIS. I will ask that.

Q. Mr. Denzel, what type batteries were these of which you were just speaking, sold in these early years?

A. Those batteries that we manufactured ourselves bore our own catalogue number, of course. However, when we substituted they started with a battery called the "R" type, and this later went through Y and Z types, and later into the "SL" type.

(Narrative continued:) The batteries of the Willard Storage Battery Company in those early days were the "R" type, "R" type battery was a battery similar to that one on the table, except it was in a wood case instead of the hard rubber. I am referring to the battery, photograph of which is mentioned as plaintiff's exhibit 2. The only difference between the type that you see on the table, exhibit 2, and any one of the types of storage batteries which were used on automobiles between 1922 and 1926 was in the connection, the connectors on the top. They had the same constituent parts, they performed the same functions and fulfilled the same duties, the only difference being in the difference in the manufacture of the case and in the connectors.

My business now is that of electrical contractor and dealer. I am not dealing in storage batteries today, excepting in use on a radio. I still sell batteries for radio. I sell Willard storage batteries for radio, and sold them during the years 1922 to '26.

Those batteries that were purchased by us then were sold with sets to the Haas Electric Company, who I understand were the wholesalers for the Willard Storage Battery Company. That battery was similar to the one standing before you, the photograph of which has been identified as plaintiff's exhibit 1. We sold a battery of that type or similar to that—I presume it was that type—for radio.

100 Mr. OSMUN. Your Honor, I move the testimony be stricken out. That type of batteries is not included in the list of batteries which were taxed involved in this action.

Mr. NORRIS. I think we have shown, if the court please, a continuity.

The COURT. Why do you say that, Mr. Osmun—because it was made in 1931?

Mr. OSMUN. No; because it is not of the type battery.

The COURT. I don't understand that; I don't understand it was precisely the type battery on which they paid taxes.

Mr. OSMUN. Not at all. I don't think it has been emphasized enough here in this trial. There was a limited list of types of battery manufactured by the Willard Storage Battery Company on which the Commissioner assessed taxes. Counsel knows the types of batteries.

The COURT. What type was that?

Mr. OSMUN. The type batteries on which the tax was assessed, is that what Your Honor means?

The COURT. I want you to tell me what types you have in mind.

Mr. OSMUN. We have a complete list of types that were taxed: SJR-3, SJR-4, SJR-5, SJR-6, SQR-4, HRG-5, SJR-26, SJR-27, SJR-28, CR-13, and CR-15.

The COURT. Do you claim the batteries here are altogether different in structure and function than those that are designated by these numbers and letters?

101 Mr. OSMUN. Yes. Not as to function, Your Honor, but as to special adaptability to certain automobiles.

The COURT. You can bring that out in your defense. I don't see that you should interfere with this testimony.

Mr. OSMUN. Well, we want to reserve our exception.

(Narrative continued:) Referring to photograph marked "Plaintiff's Exhibit 5", of a battery marked "SJRR-3", we sold those batteries during the years that we sold radio sets; that is, battery-operated sets. I should imagine between '24, '25, and '26, even earlier, perhaps. I am familiar with the construction of that battery. I am also familiar with the construction of battery represented by photograph, plaintiff's exhibit 1. Between those two types essentially there is no difference, absolutely no difference essentially. They are

produced absolutely the same; produce the same duty. I think I have some old batteries of that type in stock in my store at the present time. It is those batteries I sold for radio purposes, identifying this as being the general type.

During the years 1922 to 1926 there was no variation whatsoever in batteries which were applicable for use on automobiles or automobile wagons; the only changes were refinements in minor things, such as connection methods of lugs, such as handle, or something of that nature. It had nothing whatever to do with the function of the battery itself. We sold those particular batteries for use on automobiles. When we sold them for use in radios they were just as adaptable for use on automobiles, except they necessitated a clip to fasten onto these lugs which act as binding posts. The clip is no part of the battery, it is merely a device which the user adopts, according to the use to which he wants to put a battery.

The COURT. Did you sell these batteries for purposes other than radio and automobile purposes?

The WITNESS. Not in the later years we didn't; no, sir. We have in the years gone by; not during the later years.

Q. Not during the year '22 to '26? A. No, sir.

102 Cross-examination by Mr. McMAHON:

Referring to exhibits 5 and 1, by "essentially the same", I mean these two batteries are both in hard rubber containers, so they are alike in that respect. They are both contained in hard rubber containers in a single moulded jar containing three compartments; then each individual cell has a hard-rubber cover exactly the same kind; they have three vent caps; they may be different slightly in design but not at all in utility. They serve exactly the same purpose. The connectors are strap connectors and are apparently lead burned together; the same thing in one battery as the other. The terminals are alike. The only difference I can see in these batteries is one has a metal handle and one has a little hard rubber edge to it to pick the battery up by. Approximately I know what is in the enclosure of each of these cells of plaintiff's exhibit 5. I can't look through the hard-rubber jar, but I should imagine they contained about a seven- or nine-plate cell. I think they each do; I think they are about the same capacity. It is probably a sixty or eighty ampere-hour battery. It is quite possible that in plaintiff's exhibit 1 there are 13 plates instead of nine. That would make a difference in capacity; it would increase the capacity. I have no way of knowing that was nine plate, eleven plate, or thirteen plate. [After examining plaintiff's exhibit 1.] It is thirteen plates per cell. During the years 1922 to '26 I sold radio batteries that were made by this company. I sold those as original equipment on radios. Those batteries probably had either eleven or thirteen plates. As a seller of those batteries I had very little occasion to open them up, and that is the only way I could tell. Radio batteries were sold on capacity, either sixty-eighty, hundred and a hundred and twenty ampere-hour

and so we gauged the battery rather by that instead of the number of plates it contained. I don't know how many plates in a 120-ampere-hour battery unless I know the size of the plates. Some of them were 120 amperes; some of them 100 and some 120. I don't know anything whatever about the sizes or thicknesses of the plates that were in those radio batteries.

103 William E. Bender, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is William E. Bender. I am employed by the Willard Storage Battery Company and am manager of the Cleveland branch store of that company. I come in contact with the users of storage batteries which we sell. I sold batteries during the years 1922 to '26. The batteries adaptable for use and which were used in automobiles, automobile trucks, and automobile wagons we sold for intercommunicating 'phone system, marine use, radio use. That is during '22 to '26. Oil switch pumps, emergency light. That is all I recall now. In addition to that some of the other uses to which some of the other witnesses have testified. We sold for radio purposes during those years. The AC tube didn't come into existence until '28, I believe. All home radio receiving sets required two batteries, one for filament and one for power. There were quite a number of the "SLI" batteries sold for use in radio sets, as to the individual consumer. There was likewise quite a number of them sold to the various radio dealers, such as department stores and small dealers handling radio sets. They were so constructed that a bale handle could be applied to the "SLI" battery for easy carrying.

The WSB-13 type Willard battery shown me was manufactured and sold during the latter part of—I think it was '26; I think it was during 1926. The apparatus now shown me is the bale handle of which I spoke. That fits into a hole in the battery case. That is the way it was used for radio purposes. There were a lot of cases where the ultimate consumer bought a battery like that and made it interchangeable in his automobile. For instance, the man who owned the car, who had an "SLI" or radio battery, and would use the extra battery on his radio set. When that was discharged from the use on the radio it would then be installed in the automobile and charged from the generator, and vice versa. There were quite a number of instances of that sort, of interchangeable use.

104 During the period in suit, 1922 to 1926, we sold a number of batteries adapted for use and which were used in connection with automobiles and trucks for intercommunicating phone systems in apartment houses and with that we sold a colloid rectifier. That was a rectifier manufactured by the Willard Storage Battery Company for charging "A" batteries, and they would rectify the battery itself after use on intercommunicating service and would charge it by means of this rectifier.

Q. Were the batteries which you sold for use in connection with automobiles and automobile trucks during this period and which

were adaptable for that use, were they equally as well adaptable for the other uses which you mentioned?

Mr. McMAHON. The government objects to that for the reason this witness is not qualified as an electrical expert. There has been no foundation laid as to the specific construction of the thickness of the plates, and so forth. It is also calling for the conclusion of the witness, and it is usurping the power of the court.

The COURT. Overruled.

Mr. McMAHON. Exception.

A. Yes, sir.

Q. Was there any distinguishing characteristic on any of the batteries which you sold during this period adapted for use and were used on automobile trucks and automobiles, which made them adaptable primarily for that use only?

A. No, sir.

Q. You have stated they were interchangeable in use?

A. Yes, sir.

Cross-examination by Mr. McMAHON:

I would say during the year 1926 there was approximately 1,200 batteries sold to radio dealers and department stores for use as radio batteries. There was several hundred sold to individuals for use on radio sets direct, not only in our own station but all over the
105 city. I would say there would be many hundreds. I am talking about Willard storage batteries. I supervised the sales in these other stations. I could not tell today the exact number of batteries that each of those stations sold.

The advent of the automobile was considerably before the radio. The handle would serve very nicely on an automobile battery if we had one adapted for that use. I did not intend to convey that the handle used on a radio battery was not adapted for automobile use.

I couldn't answer how many of these interchangeable cells for use on autos and radios, interchangeably, we made from June 1922 to December 1922; neither could I answer as to '24, '25, or from January to February '26.

When they took a rundown battery out of the radio and put it in the automobile, they did that chiefly to charge it off the generator. It might have sufficient current to start the automobile with. If it was run down, it could be half charged—half discharged. I don't know whether it had sufficient current in every case.

Q. Does the battery have the same duty to perform with respect to a radio as it does with respect to an automobile?

A. No, sir.

Q. Is the duty of a battery, with respect to a radio, greater or smaller than the duty required of a battery with respect to an automobile?

A. Smaller.

(Adjournment taken to the following day, whereupon at 9:30 a.m., Friday, May 15th, 1931, the trial was resumed.)

Robert S. Van Cleve, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Robert S. Van Cleve. I am employed by the Willard Storage Battery Company as development engineer, western industrial sales manager, and radio sales engineer. I have occupied that position since 1925. Beginning with 1912 I was affiliated
106 directly with radio applications. Between '18 and '19 I was chief radio operator for the United States Navy. Between 1919 and 1920 I was assistant district manager of the Hoover Suction Sweeper Company, and after '21 I was manager of the Selzer Electric Company, manager of the electrical department. Between '22 and '24 I was sales manager of the Radiovox Broadcasting Station WHK, city of Cleveland. In connection with my various duties, I am familiar with radio broadcasting and radio receiving and am familiar with the apparatus used in both those services.

During the years 1922 to 1924 radio receiving sets were all DC sets, requiring the use of storage batteries. They became less general in use in 1927 because of the invention of the AC tube.

I am familiar with the types of storage batteries of the Willard Storage Battery Company which were applicable for use and are used in connection with automobile trucks, automobile wagons, and automobiles. Such batteries are applicable to the A battery of a radio receiving set, known as the filament or heating battery. The storage battery of that character is not applicable to the B battery. I speak only about the A battery with relation to these receiving sets.

I was engaged in the business of selling radio supplies from 1921 until 1925, when I entered the employ of the Willard Storage Battery Company. During that period, in connection with that business, I sold storage batteries of the Willard Storage Battery Company of the type used on automobile trucks, wagons, and automobiles for use on radios. The volume in units was probably in the neighborhood of about 500 batteries per year, as near as I can recall it.

I also dealt in other supplies which were used in connection with home radio receiving sets, in connection with storage batteries. Perhaps the most outstanding use of a supply other than actual radio was the clips that we had to purchase and use for converting the application of the automobile battery for radio, as it were. We used a large number of those clips known as the Mueller clip. Those clips were not part of the storage battery; it was a device used to connect the circuit with a storage battery. The Mueller clips were
107 a metal spring device with teeth that clamped over the post of the battery. They were used to adapt the Willard storage battery to radio uses, because the battery at first had a straight post and could not be connected to a radio circuit without a clip. During the years '22 to '24 we purchased the clips in units of one thousand. During those years our turnover was approximately six

times per year, which would work out about six thousand clips per year. Two of those, of course, are required for each battery.

Beginning in 1925 I was employed by the Willard Storage Battery Company and my business was to promote sales in the radio field particularly to the broadcasting stations. Referring to the use of the storage battery of the type applicable for use and which were used on automobiles, automobile trucks, and wagons, of the Willard Storage Battery Company, the type of battery known in our language as the "SLI" battery was used primarily to supply filament current to the speech in putting amplifiers on these broadcasting stations, and to the remote control amplifiers. That battery was then, and is today, a twelve-volt type, a six-cell battery, which is used primarily for starting motor cars, such as the Dodge, the unit systems such as the Dodge type.

I made the first installation of the so-called "SLI" type batteries for the first broadcasting station in the city of Cleveland, station 8ACS, and then WHK. After I entered the employ of the plaintiff I sold these type batteries to other broadcasting stations throughout the United States, to some 54 different stations. The number of batteries which a broadcasting station required depended on the number of units for remote control which they had. However, the average was about two of those batteries for use and two for standby. The batteries usually lasted about a year. I should say we sold probably two hundred, three hundred of them for that specific purpose to each station. This is to broadcasting stations.

It was part of my duty after 1925 to develop the sale of Willard storage batteries of the so-called "SLI" type among airplane service. The types used in airplane service varied. However, use was made of the same type battery that we have just discussed that was used in broadcasting service, and that was used to light
the landing lights, the navigation lights and instrument
108 lights, and to start the electric inertia starter on the airplane.

During the years 1922 to 1926 the "SLI" batteries were used particularly for the lighting of farms or farm light applications; for the use as an interchangeable unit for motor car and radio, where we had a number of customers who would buy the same type battery for their radio which they are now using or were then using in their motor car, and used that battery until it had been discharged below an operating point for radio, and then place it in the motor car and recharge it, using the one that was then in the motor car to operate the radio set. For marine use on vessels from thirty feet down, some larger; for depth sounding equipment. We used some of them at times for special applications in the Navy, and in a few instances for gun firing.

Q. During the time since 1925 can you form any conservative estimate of the proportion of "SLI" batteries sold by the Willard

Storage Battery Company of the "SLI" type which were used for radios?

Mr. McManus. The Government objects to that for the reason it calls for the conclusion of the witness. There is no showing with reference to the testimony of this witness of the use on radios that the duty requirements are the same.

The Court. He may answer the question.

Mr. McManus. The Government excepts.

A. I can approximate that. It is rather difficult to give an absolutely definite figure.

Q. Please be conservative.

A. I should say from ten to fifteen percent, perhaps a little over that.

Q. Mr. Van Cleve, were the "SLI" type batteries of the Willard Storage Battery Company just as adaptable for use in connection with radio as they were for automobile?

A. Yes, sir.

Mr. McManus. Just a minute. The Government objects.

The Court. You may save your point.

Mr. McManus. The Government preserves its exception.

A. Yes, sir.

Cross-examination by Mr. McManus.

The batteries which we sold for use in connection with airplanes, starting the motor and lighting the landing lights, and so forth, have the same type of vent plug as the battery used in an automobile, in every instance except in the last few months, where there has been a different type of vent plug developed, but not a nonseepage; it is merely to eliminate the spray of acid, fumes and so forth while the battery is on charge. The advent of the automobile was prior to the advent of the airplane.

If you consider it mechanically, the duties required of the particular batteries sold for use in radios were the same as the duties required of that particular battery for use in automobiles. If you consider it in the general application, the function and requirement was to deliver current at a definite potential. Considered in the general application it was precisely the same. The duty is not the same from the standpoint of starting, lighting, and ignition. There is a lighting filament and vacuum tube. The duty is otherwise the same.

I took that into consideration when I answered the question in which I stated that the battery was just as adaptable; it is just as adaptable.

Leonard G. Baldwin, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Morris:

My name is Leonard G. Baldwin. I am not now employed by the Willard Storage Battery Company. At the present time I am with

the Transitone Automobile Radio Corporation. I left the Willard Storage Battery Company on March 1, 1930. I was employed there from October 1, 1917, to March 1, 1930. Between 1922 and 1926 I was manager of radio sales. My duties were to make sales entirely through radio channels.

Starting in 1922 we developed what we thought at that time was required by the trade, a special radio filament battery of heavy plate construction, a special case construction, and special handle construction, a very as it turned out afterwards to be expensive battery. Later on, a year later, we found that competition was using a standard starting and lighting construction for radio purposes at a much lesser price than our standard radio battery. As a result we then went to standard starting and lighting construction, the size of the case being similar, inside construction identical; the only difference being that we placed the name "radio" on the case and a special carrying handle. Later on we found that Willard service stations throughout the United States, through disassembling the battery, had found it was nothing but starting and lighting construction, whereas we had for merchandising purposes undertaken to put across the story on the service stations and to the public that it was a special battery. Immediately we found that our sales in what we were trying to put across as a special radio battery had dropped off, and that the public and Willard service stations were taking and using standard starting and lighting batteries by adapting a special attachment so that it might be properly hooked to radio sets. The reason for this was twofold. One was that it could be purchased considerably cheaper than the radio battery; the other was that the Willard service stations were not required to carry two lines of stock. Later on we then used identically the same case, the same identical battery as we were furnishing for starting and lighting purposes, leaving only a hole in each end of the case. It made no difference in manufacture whether that particular case was for starting and lighting purposes or for radio purposes; and furnished to the service stations a handle and a clamp that might be adapted to that particular battery, identical in every way except the handle, with the same battery that we were selling for starting and lighting purposes. In the course of my employment I went all over the United States visiting dealers and persons who sold directly to the consumer, and broadcasting stations, for the purpose of ascertaining the use of batteries in connection with radio receiving sets and broadcasting sets, increasing our sales.

In the course of my employment and for the purpose of developing the field of radio use of storage batteries of the "SLI" type, I made two surveys. One was a single survey through the State of Iowa; another was a nation-wide survey. The Iowa survey was either in 1923 or 1924. I cannot say which of those two years. In 1922 I started on a particular survey, going throughout the United States, coming back and making a report to my company of what I thought that we needed in the way of radio batteries. Continually

year after year I made minor surveys. Probably fifty per cent of my time was out in the territory. 1922 was the year that the general public commenced to get some idea of radio, and radio became popular in use.

Along with a number of other manufacturers of radio sets and radio batteries, I went with the Meredith Publication representatives for a period of five days throughout the State of Iowa, to find out generally what the farmer was using. This survey was in the rural communities. We found that without exception it was a starting and lighting battery, and dry B batteries; it developed that in rural communities we didn't have any market for the B battery; but there was a market for the A battery. Instead of using the radio battery we found that the farmers were using starting and lighting batteries in two ways; that some farmers had two batteries and that weekly or semiweekly, depending upon the use, the length of hours they were using their batteries, they would take the battery out of their automobile and place it in the house attached to the radio set, and when that battery had run down to a certain extent that was then put back into the automobile, and the one that was in the automobile was then replaced in the house. We also found that where the farmer either could not afford or did not have two batteries in one particular instance or another, that we were told that the farmer would run the wires from his set out the window to his automobile, using the automobile or starting and lighting battery without removing it from the car, for lighting the vacuum tubes of his radio set. At that particular survey we did not form any estimate of the quantity of so-called "SLI" batteries which were used on radios in the State of Iowa, except that I came back with the report that in rural communities the farmer was using his automobile or starting and lighting battery for radio use.

With reference to the other surveys which I made during the years 1922 to '26, I reported to my employers that one out of every five batteries on charging lines of Willard service stations were starting and lighting batteries which had been adapted to radio purposes. By "charging lines", meaning the lines in the shops of dealers who came in contact with the consumers for recharging batteries.

Referring to the sale of Willard "SLI" batteries to the United States Government during the war, and their use after the armistice, I have in mind a particular instance, which I presume is the one you refer to, in which a duplicate shipment of starting and lighting batteries was made to the Government to be shipped to France. The original shipment was lost and was duplicated. Some time, probably four years, possibly five years after the armistice, this lost shipment was found, and my employers were asked if they could use the batteries. Due to their age they told the Government they could not use them. As a result they were purchased by a firm in Boston and generally advertised as adaptable for radio use. Because of certain advertising appearing in Chicago papers of Willard radio batteries at prices below those at which Willard dealers could sell bat-

teries, and because of the complaints, I made a trip to Chicago and found on State Street some forty or fifty of these starting and lighting batteries on which had been placed the right kind of connections for radio use, and these were the batteries that were being advertised as radio batteries. They were entirely of the "SLI" type.

During the period 1922 to 1926 I was chairman of the storage battery committee of the radio section of the Associated Manufacturers of Radio Supplies. That association consisted of manufacturers of electrical equipment, including storage battery manufacturers, and radio manufacturers, and having to do with the use of storage batteries in connection with radios, and in a broader sense it had to do with all electrical equipment in connection with radio use. However, I was interested only in the storage battery end of it.

113 I was chairman of that committee, as representing the Willard Storage Battery Company, but all storage battery manufacturers.

In the course of my duties as chairman of that committee, for the purposes of the committee, surveys were continually made in cooperation with the Department of Commerce of the Government, as to the number of radios in use throughout the United States, and in 1925 and '26 it was estimated there were between five and six million radio sets in use. Probably 75% of those sets used storage batteries. That was prior to the advent of the AC tube set.

I know that it was quite common to advertise "SLI" batteries for radio use. I have in mind very large banners which the Ford Manufacturing Company displayed in their sales agencies throughout the country, in which they called attention to the public that the batteries were for automobile and radio purposes. I have made an effort to procure one of those banners. They were used, I would say, during 1924, 1925, and 1926. Plaintiff's exhibit 15, to the best of my recollection, is a correct photograph of the banner used during the years I have just mentioned. I know that these banners all referred to the use of batteries for radio purposes.

Mr. Norris. Identify that as plaintiff's exhibit 15, and for the purpose of the record I call attention to the fact there appears the wording: "Ford batteries—ideal radio 'A' battery." I offer in evidence plaintiff's exhibit 15, and I also offer in evidence paper which is marked "Plaintiff's Exhibit 16."

(Said plaintiff's exhibits 15 and 16 are attached hereto and made a part hereof.)

(Narrative continued:) The spring clip with small teeth at the end is the type of clip that was used in the early days of radio to attach to the posts of a "SLI" battery for radio use. That may be a Mueller clip; there were several manufacturers of the same kind of a clip. These are not part of a storage battery. The clip now shown me has a bolt and nut to fasten the device to the post, with a wing nut for the purpose of attaching a wire, and also a type of terminal connector used in applying storage batteries, which were

114 applicable for use in automobiles and automobile trucks, for use in radio.

I am a member of this bar.

The COURT. Are you putting the clips in?

Mr. NORRIS. If by agreement I can substitute photographs after this case, I would like to put them in evidence. They are fairly material.

Mr. MCMAHON. You may offer them in evidence and substitute photographs without objection on the part of the Government.

The COURT. They will be 17 and 18.

Mr. NORRIS. The Mueller clip will be plaintiff's exhibit 17.

(Plaintiff's exhibits 17 and 18 are attached hereto and made a part hereof.)

Cross-examination by Mr. MCMAHON:

I would say the duty requirement of a radio is the same as the duty requirement of an automobile to the point of furnishing current, not beyond that point; there is a difference.

Defendant's exhibits D, E, F, and G are lists of starting and lighting batteries with consumers' net prices. They have on here the dates of 1921, 1923, 1924, and 1925. These exhibits D, E, F, and G contain a representative list of the "SLI" batteries which I mentioned as having been sold for use on radio.

Redirect examination by Mr. NORRIS:

These price lists I have just identified are price lists in connection with the catalogue or bulletin no. 136, identified as "Defendant's Exhibit A", and marked "Electric Storage Batteries for Automobiles, Motor Boats, Tractors, and Trucks." These price lists changed from time to time during the years '22 to '26.

115 Leonard J. Lechner, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My full name is Leonard John Lechner. I am a dealer in electrical and automobile supplies, incidentally selling the batteries of the Willard Storage Battery Company, of the so-called "SLI" type for use in automobiles and trucks. My place of business is in Berea, Ohio, and have been there for 15 years.

During the years '22 to '26, other than for use on automobiles I have sold the "SLI" batteries for radio batteries and starting of tractors and electric clocks, and for lighting purposes in residences. Also in hospitals and laboratory work, experimenting in laboratory work. I had a number of those "SLI" batteries in stock, as we all did, to rent for different purposes. I rented them for automobiles and for lighting and for operating of moving-picture shows, also for radios.

Cross-examination by Mr. McMAHON:

We sold the most of the "SLI" batteries for automobile use.

C. C. Schellentrager, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is C. C. Schellentrager. We are distributors of Willard storage batteries for eastern Cuyahoga County. We sell both to consumers and other service stations. I have been in that business 11 years.

During that time I have dealt in all types of batteries, including the "SLI" type battery. For other purposes during the years
116 1922 and 1926 the "SLI" type batteries of the Willard Storage Battery Company have been used in intercommunicating systems in large buildings. They were sold for intercommunicating systems in large buildings, the operation of electric clocks throughout public buildings, the large buildings, the lighting of remotely situated dwellings and club houses; for ignition purposes on stationary engines; sold in some cases where they would be used for welding purposes, to furnish current for that purpose; to operate relays on oil switches; for radio purposes, and of course in automobiles during the same period.

As to what an oil switch is—some of these heavy current carrying circuits, when the switch is open the arc is rather large, so to quench the arc and prevent it from causing damage either to a person operating the switch, if it is operated by hand, or causing a fire or property damage, they have a relay which is operated by current of low voltage which the battery operates, and when that relay closes the battery operates the magnet and opens or closes the switch. The arc or points of contact of the switch are enclosed in a container filled with oil which prevents the current arc from doing any damage.

During the years 1922 to 1926, the percentage of the total sales of the so-called "SLI" type batteries sold for use for radio and other purposes, other than for use on automobiles and automobile trucks, I would say, ran forty percent, possibly higher. That is more or less of an estimate.

Cross-examination by Mr. McMAHON:

The duty requirements of a radio are basically the same as the duty requirements of an automobile. They are both an electrical apparatus which require a current. Electricity is the same in any form or shape. You do not have a turning over of an internal-combustion engine in connection with the operation of a radio. It is relatively different in that respect.

I would say we have possibly twenty public buildings in our trade territory. During that period I know of none of those buildings

which used the "SLI" batteries for lighting purposes. If I remember correctly, during that period we had batteries in five of them for use for clocks.

117 The principal or chief use for which we sold Willard "SLI" batteries during the period 1922 to 1926 would be for automobiles.

We had two of those peculiar switches in our territory that I know of.

L. W. Leonard, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is L. W. Leonard. I am operating a retail service station, Willard service station in East Cleveland, and have been in that business nine years. In the course of my business in this service station I have been selling the Willard storage batteries of all kinds to various users, including the types which are applicable for use and used on automobiles and automobile trucks.

During the years 1922 to 1926, I furnished batteries to the Cleveland Clinic for laboratory purposes, running different machines, and furnished the East Cleveland police signal system with storage battery. Some of the new apartments on Chapman Avenue were furnished with batteries for bell ringing. Sold one battery for preignition on an oil motor, and then I have sold radio batteries, sold for radio batteries, and I have only furnished one for a mechanical toy. I furnished a battery to the Austin Company for their crane. I believe it was a SJRR-26. It was a twelve-volt battery. I remember selling for toy motors. I have used it for an odd use of lighting a fishing line, a signal telling when a man had a fish on his line. I have furnished "SLI" batteries for motor boats. In fact, in the peak of the radio season in our business, fifty percent of our "SLI" batteries were used for radio purposes. I mean peak of the season when they were using battery-operated sets; that is, I would say '24, '25 and '26, in the winter of '26; that is, the winter was always our biggest business, and those years our radio business overcame our other uses.

118 Cross-examination by Mr. OSMUN:

I sold storage batteries only. Mine was a storage battery service station. We service any kind of storage battery for any purpose. We do not classify our batteries for automobile or anything else. We have storage batteries, and they come in blocks—six, twelve, twenty-four volts. A man comes in and asks for a storage battery; we fit the storage battery for the purpose he wants to use it.

The duty requirements of a radio are not the same as the duty requirements of an automobile truck or automobile, only they use current. They are the same battery. The requirements of both is to furnish power. If it is a six-volt battery it is the same for radio as it is for an automobile; a battery, if it is using six volts, a radio set is using six volts, they both furnish six volts.

Redirect examination by Mr. NORRIS:

To a certain extent I am familiar with the automobile radio as to which Mr. Baldwin testified. It is a radio set attached to the automobile.

I furnished the batteries for the East Cleveland police department. On some cars the "SLI" battery on the automobile also operates the radio, some of them we use a separate battery, because just in the past year or so they made it so you could change it over. But they use in their cars the same—we sold them the same type battery for their Ford cars as we did for the radio; and the reason we did this is because they had to have two batteries for every car and consequently they were operating three or four cars and that meant quite a few storage batteries, and they couldn't keep them separated. So they were used—sometimes they would be used in the back of the car and for the radio, and next time they might go into another car for starting and running the automobile; but they always bought the same type of battery because they were interchangeable.

Mr. NORRIS. If the Court please, by permission, I would
119 state—I intended to ask Mr. Baldwin to describe it—the Transitone Automobile Radio Company manufacturers a radio set which is attached to the automobile, and the same battery which operates the automobile also operates the radio set, and that the radio set is operated while the highest duty, the cranking duty is being performed in the automobile.

The COURT. What type battery is it?

Mr. NORRIS. It is "SLI" type battery, original installation in the automobile.

Recross-examination by Mr. MCMAHON:

The automobile was first. The advent of the automobile radio has just been lately. The first one I recall is about three years ago.

Wayne W. Parsons, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Wayne W. Parsons. I am operating a Willard service station, distributing batteries in the northern part of New York State, and have been in that business approximately eight years.

During the period 1922 to 1926 I sold to users of storage batteries the batteries of the Willard Company applicable for use and used on automobiles and automobile trucks and wagons. I sold only Willard batteries. We sold "SLI" type Willard batteries for use in radio sets and for marine operation in power boats; for lighting plants; we sold some for signal operation in schools, and some for road machinery operation. I would say about ten percent of our business represented sales for use in motor boats.

120 Cross-examination by Mr. McMAHON:

The duty requirements of a radio set are the same as the duty requirements of an automobile in that they both require current from the battery. Beyond that point they are not the same.

In speaking of road machinery I refer to road machinery using a gasoline motor. These batteries were used for starting and lighting purposes and ignition. I include in that category these big automobile type trucks. The lighting plant does not have the same duty requirements as the automobile, except they both require current from the battery.

Charles E. Haas, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Charles E. Haas. I am a proprietor of the St. Lawrence River Motor & Machine Company, which is also a Willard station, at Clayton, New York. I have been in that business about 22 years.

During the years 1922 to 1926 I sold Willard storage batteries applicable for use and which were used in automobiles and automobile trucks, and also for other purposes, such as for marine purposes and radio. During the years 1922 to 1926 about seventy-five percent of my business in the sale of "SLI" type of Willard batteries was for other use than for use in automobiles and automotive trucks. They were used principally in the motor boat fields, marine and the radio.

Cross-examination by Mr. McMAHON:

We run a machine shop, marine hardware. We sell Dodge boats and marine engines. A radio and an automobile use the same current. They are not the same beyond that. The automobile requires more current at a time.

121 Redirect examination by Mr. NORRIS:

The use on motor boats is for starting and ignition of an internal-combustion engine. The duty is the same to start an internal-combustion engine on a motor boat as to start an internal-combustion engine upon an automobile.

Recross-examination by Mr. McMAHON:

The duty requirement of a specific size of internal-combustion engine in a motor boat is the same as the duty requirement of the same specific size of internal-combustion engine in an automobile. On some occasions the duty requirements as to lighting in use in a motor boat are the same as the duty requirements as to lighting in an automobile. Some boats have thirty-two volts and others have six and twelve. In other cases they are not the same.

Walter S. Bailey, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Walter S. Bailey. I live in New Rochelle, a suburb of New York City. I am sales manager of Motor Boating, a magazine published to increase the interest in use of boats. It is the largest magazine in its field. I have been in the present position for a little over twelve years, as sales manager. I have been in the employ of Motor Boating magazine for 20 years.

I am asked the question frequently as to the number and kinds of motor boats in use in United States and the apparatus used in connection with them. During the years 1922 to 1926 I made surveys and furnished estimates for the use of Motor Boating magazine as to the number of motor boats in use in the United States. We have always had an estimate every year to meet questions that came up.

This estimate is increased from year to year as the number of
122 boats increased. In 1924 we figured there were about 700,000 boats in use in the United States; for 1925, 750,000; for 1926, 800,000.

We were familiar with the use of batteries for different purposes on boats. During the periods '22 to '26, we used automobile-type batteries on motor boats; the same batteries that were made for automobiles.

I have made an estimate as to the number of batteries used on motor boats of type applicable for use and used on automobiles, automobile trucks, and automobile wagons. I should say that the number of batteries used in 1924, 700,000 motor boats was the equivalent of 850,000 automobile batteries; as to the year 1925, perhaps 375,000 batteries; and for the year 1926, 400,000 batteries.

Cross-examination by Mr. MCMAHON:

I do not mean to say the 350,000 batteries were used in motor boats during the year 1924 were Willard batteries, nor as to the 1925 or '26 estimates, that they were Willard batteries. There are all makes of batteries on the market.

The motors used in these motor boats in which batteries were used are very similar to an automobile motor in general design, but there are certain differences in them that make them more durable motors for marine use, and on the whole they will average larger in size than automobile motors. They will compare more with trucks for the larger size boats and fast boats. The duty requirements of those large marine motors are if anything a little more difficult on a boat than the requirements of the lighter automobile engine.

Irving K. Schnaitter, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Irving K. Schnaitter. I am a member of this bar and assistant treasurer of the Willard Storage Battery Company.

I did not make the computation of the excise taxes which
123 were paid by the Willard Storage Battery Company during the years '97 to '98, but I had supervision of the payment of the tax, under my department. I paid no taxes upon storage batteries sold by the Willard Company to manufacturers of automobiles. As to paying taxes and making a return upon storage batteries which were sold directly by the company to other persons for other uses than for use in automobiles, if they were used for manufacturing and were exempt by the revenue act, upon the presentation of an exemption certificate, we paid no tax upon it. The balance of our product was sold to jobbers, electrical concerns, and dealers for resale by them. All the rest of our product was sold to those persons I have previously described. It was upon those sales we made our return for taxation. Dealers are persons who distribute or sell our storage batteries directly to the consumer, such as Mr. Hane, who was on the stand a moment ago, and Mr. Schoenberger, who was also on the stand.

During the years 1922 to 1926 the number of dealers the Willard Storage Battery Company had contracts with would run somewhere between three thousand and thirty five hundred. We also had our own operated service stations, approximately sixteen or seventeen, during the period '22 to '26. These were very well scattered throughout the United States. The dealers were also located widely throughout the United States; it was our endeavor to cover the entire country.

Cross examination by Mr. McManus:

Defendant's exhibit A is a copy of a bulletin, No. 130, which was issued by our company.

The Court. They have already been identified, haven't they?

Mr. McManus. I was just going to identify them for one purpose. If he will say this is all advertising in magazines, catalogues, and bulletins put out by his company for the periods indicated thereon, I will ask him one question and then I am through.

The Court. Well, is that correct, Mr. Schmajtter?

124 The Witness: I haven't looked them all through yet. The balance of these exhibits seem to be photostatic copies of advertisements or catalogues that were issued by our company.

(Narrative continued:) I can't answer the question as to whether those exhibits contain the lists of "SLI" batteries upon which the plaintiff paid tax. It contains in addition the lists of manufacturers to whom we furnished batteries.

Redirect examination by Mr. Norris:

As to the price lists which accompany our catalogues, the identification of the batteries by letters indicates the batteries on those particular price lists for that particular time when the price list was promulgated. We changed the designation from year to year on an identical battery. During the period of 1922 to 1926 there was a con-

stant change of designation for our own purposes; but the batteries were the same.

Mr. Nomis. Mr. McMahon, we made call for the production of a letter in the month of May 1919 accompanying the first payment of taxes. Can you produce that letter?

Mr. McMahon. I cannot. You mean the call for the letter written?

Mr. Nomis. In accordance with the notice dated May 9, 1931, to the United States district attorney at Cleveland, calling for the production of a letter written by the Willard Storage Battery Company, addressed to the collector of internal revenue, Cleveland, dated on or about May 5, 1919, accompanying the delivery of check no. 15846, dated May 1, 1919, payment of excise tax upon batteries sold for the month immediately preceding. Can you produce that letter?

Mr. McMahon. The Government has made diligent search 125 both in the files of the collector and the files of the Bureau, in Washington, and is unable to find either the return or the letter. Such return has probably become lost or destroyed under the statute return and letter.

Mr. Nomis. I offer the letter as plaintiff's exhibit 19.

Harry J. Stiles, a witness called by plaintiff, being first duly sworn testified as follows:

Direct examination by Mr. Nomis:

I am treasurer of the Willard Storage Battery Company and was such in May, 1919. I personally made payment of the check which represented the excise tax under the act of 1918, upon the sales price of storage batteries sold by the Willard Storage Battery Company during the preceding months. I made that payment at the offices of the collector of internal revenue on the lower floor of this building at Cleveland. As I remember it, there was several cashiers, and there was one particularly, I think, near the personal office of the collector of internal revenue, where it had a notice up, "Pay excise taxes here." So there is where I presented a certified check along with the statement of the taxes in duplicate, and also a letter, and at the same time of handing the documents in to the cashier, I stated that we were paying those taxes under protest. Mr. Schnaitter, my assistant, assistant treasurer at that time, accompanied me. He is the assistant treasurer who just testified. The check I presented to the cashier was the first payment of excise tax upon the sale of storage batteries. As to whether the sales on which the tax was assessed and collected was for the month of April 1919, it was the first payment we made, the first payment necessary under that date. I think I could prove that further, though. I have a receipt.

Mr. McMahon. The Government concedes it was April 1919.

126 Cross-examination:

By M. McMahon. I think Mr. Weiss was the collector to whom I made that payment, but we paid it to the cashier.

Mr. Norris. If the court please, I offer in evidence publication of the Department of Commerce, dated October 6, 1924, exemplified under the act of Congress, called "Recommendation for Regulations of Radio, Adopted by the Third National Radio Conference", for the particular purpose of calling attention to the number of radio receiving sets in the United States, 1922 to 1923 1924, as plaintiff's exhibit 20. I also offer in evidence as plaintiff's exhibit 21 a publication of the Department of Commerce, dated May 4, 1931, exemplified under the act of Congress, drawing particular attention to page 291, which lists the number of tractors purchased during the years 1922 1930. I am asked to state and do state these documents are presented for the purpose of showing the numbers of radios generally, not that these radios use Willard storage batteries. I also offer in evidence a statement of the Department of Commerce, as plaintiff's exhibit 22, containing no date as to its promulgation, certified under the act of Congress, setting forth a compilation of licensed motor boats by the United States for the years 1919 to 1930, inclusive. I also offer in evidence as plaintiff's exhibit 23, the Agricultural Yearbook published by the Department of Commerce in the year 1930, exemplified under the act of Congress, particularly that portion of which appears on page 1040 and 1042, which sets forth a schedule, sets forth the number of tractors in use for agricultural purposes only.

(Said plaintiff's exhibits 20, 21, 22, and 23 are attached hereto and made a part hereof.)

127 Irving K. Schnaitter, being recalled, further testified as follows:

Direct examination by Mr. Norris:

I accompanied Mr. Stiles, treasurer of the plaintiff company, on May 5, 1919, when he made the first payment of excise tax to the collector of internal revenue. I am familiar with the conversation which Mr. Stiles had with the cashier of the collector.

I have made search for the copy of the letter which accompanied that check and have not been able to find it. In a general way I am familiar with the contents of that letter. The letter stated that we were making payment of this excise tax under protest because we thought it was illegal. The letter was directed to the collector of internal revenue. If Mr. Weiss was in office at that time it was addressed to Mr. Weiss.

Mr. Norris. I offer in evidence plaintiff's exhibit 19. It is probably not a part of the record. It is demand for production.

(Plaintiff's exhibit 19 is attached hereto and made a part hereof).

Thereupon the plaintiff rested.

Mr. Kinder. I suppose although there are separate stipulations in five cases, the evidence in the case will be considered as consolidated in all cases.

The Court:

The cases are being tried together.

Mr. McMAHON. The Government offers in evidence defendant's exhibits A to X, inclusive. The defendant rests.

(Defendant's exhibits A to X are attached hereto and made a part hereof).

Thereupon the defendant rested.

Testimony closed.

128 The above and foregoing, together with the exhibits, was all of the evidence offered and received on the trial of the above-entitled cause.

Mr. McMAHON. The defendant at this time requests the court to make each of the findings of fact and conclusions of law set forth in its request for findings of fact and conclusions of law which it desires to file in each of these cases at this time.

The defendant now moves the court for judgment in favor of the defendant and against plaintiff, and to dismiss plaintiff's petition at plaintiff's costs on each of the grounds set forth in defendant's motion for judgment, which it desires to file at this time, in each of the cases consolidated for trial herein.

Mr. NORRIS. If the court please, in like manner I present requests for findings in each one of the five cases.

The COURT. I suppose your requests are also for statement of the court's conclusions and judgment for plaintiff.

Mr. NORRIS. Yes; I was going to ask that, sir. My requests for findings of fact I didn't know until late last night—our practice in Philadelphia is to file the requests for conclusions of law at the time of filing briefs. I find in my request for findings I have not included the request for the conclusions of law, and may I have leave to add it to this?

The COURT. Just add it to that; add it now. Anything further?

Mr. NORRIS. That is all.

The COURT. Plaintiff will have thirty days from this time to file its brief, and the Government may have fifteen days to file its reply brief. The case will be regarded as submitted.

129 Thereafter briefs were filed and the court after due consideration rendered his decision in favor of the plaintiff and against the defendant, as appears from the record herein.

Thereafter the court entered judgment upon said verdict, as appears of record herein, in favor of the plaintiff and against the defendant, to all of which the defendant duly excepted.

Now comes the defendant and presents to the court its bill of exceptions, in narrative form, taken on the trial of said cause, and the court, upon consideration thereof, with certain alterations, made on plaintiff's motion, to be a true, correct, and complete bill of exceptions, and the same is hereby allowed and signed and ordered to be filed as part of the record herein this 14 day of December 1931.

S. H. WEST, *Judge*.

In United States District Court

Order approving defendant's narrative form bill of exceptions

Entered December 14, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, judge

This day the bill of exceptions in these cases was presented to the court, the same having been delivered to the clerk by the excepting party in accordance with rule 38 of the general rules of this court, and objections and suggestions thereto having been filed and considered by the court and the bill of exceptions as presented having been changed to conform with the ruling of the court on the objections and suggestions thereto, the same is allowed and signed and ordered to be filed in these cases.

130 In United States District Court

Petition

Filed May 31, 1929, in no. 15762

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $249,275.32, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to December 1, 1922, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about December 1, 1922, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eighteenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the Northern District of Ohio, Eastern Division.

3. Prior to December 1, 1922, and from that date continuously to the present time, the plaintiff has been and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on December 1, 1922, and ending on November 30, 1923, the plaintiff made sales of electric storage batteries, all of which sales were made to

persons other than manufacturers of automobile trucks, automobile wagons, other automobiles or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the de-
131 fendant made a return in accordance with the provisions of title IX, section 900, of the United States Revenue Act of 1921, of the computation of manufacturer's excise taxes at the rate of five (5) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of five (5) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A" and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B", and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in "exhibit B", which said sums of money amounted in the aggregate to the sum of $249,275.32, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in "exhibit B." All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motor-
132 cycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries, other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between December 1, 1922, and November 30, 1923, and upon the selling prices of which the said taxes were paid by the

plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motor cycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles, other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used and for many years has been used, extensively in connection with motorboats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, current lighting and auxiliary power, signalling devices in railroad systems and in military service, search lights, telephone service, isolated lighting and power plants, street railways, fire alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1922, and ending on November 30, 1923, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title IX, section 900, of the United States Revenue Act
133 of 1921, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said sales the sum of $249,275.32 as set forth in "Exhibit B" hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant, as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant, and represented the payment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1923, and ending on December 31, 1923, a true copy of which said claim is hereunto attached, marked "Exhibit D", and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E", and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F", and made part hereof.

134 13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in the sum of $249,275.32, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in "Exhibit B" hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY.
CHARLES C. NORRIS, JR.,
Philadelphia, Pa.

By F. L. FRIEND, J.,
Its Attorneys.

[*Duly sworn to by C. H. Gibney; jurat omitted in printing.*]

PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $249,275.32 with interest at the rate of 6% per annum as provided by law on the following sums from the following dates respectively: On $22,486.39 from January 30, 1923; on $15,076.44 from February 27, 1923; on $22,133.63 from March 30, 1923; on $31,792.23 from April 27, 1923; on $25,920.09 from May 29, 1923; on $14,657.74 from June 29, 1923; on $15,790.62 from July 30, 1923; on $12,705.08 from August 30, 1923; on $22,826.28 from Sep-
135 tember 28, 1923; on $17,912.98 from October 30, 1923; on $26,236.87 from November 28, 1923; on $21,736.97 from December 28, 1923, with costs.

CHARLES C. NORRIS, JR.,
Philadelphia, Pa.
F. C. FRIEND,
Counsel for Plaintiff.

Note re exhibit "A"

Printer's Note:

This exhibit being identical with exhibit A, attached to petition in case no. 15701, it has been omitted to comply with the rule against duplication. (See page 8 of this record.)

Exhibit "B" to petition

Month of sales	Date of payment	Amount of tax paid
1992, December	1993, January 30	$92,486.30
1993, January	" February 27	16,076.44
" February	" March 30	22,133.83
" March	" April 27	31,702.23
" April	" May 29	25,029.06
" May	" June 29	14,057.74
" June	" July 30	15,399.69
" July	" August 30	12,208.08
" August	" September 28	22,896.28
" September	" October 30	17,912.88
" October	" November 29	20,230.87
" November	" December 28	21,730.97
		240,978.32

143 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843 Jan. 1922
Comptroller General U.S.
January 18, 1922

Collector's Notation
District
Account number
Date received
Stamp here
Collector of
Internal Revenue

Claim for

Abatement of tax assessed
Credit against outstanding assessments
Refund of taxes illegally collected
Refund of amounts paid for stamps

Used in error or excess

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice To Collector

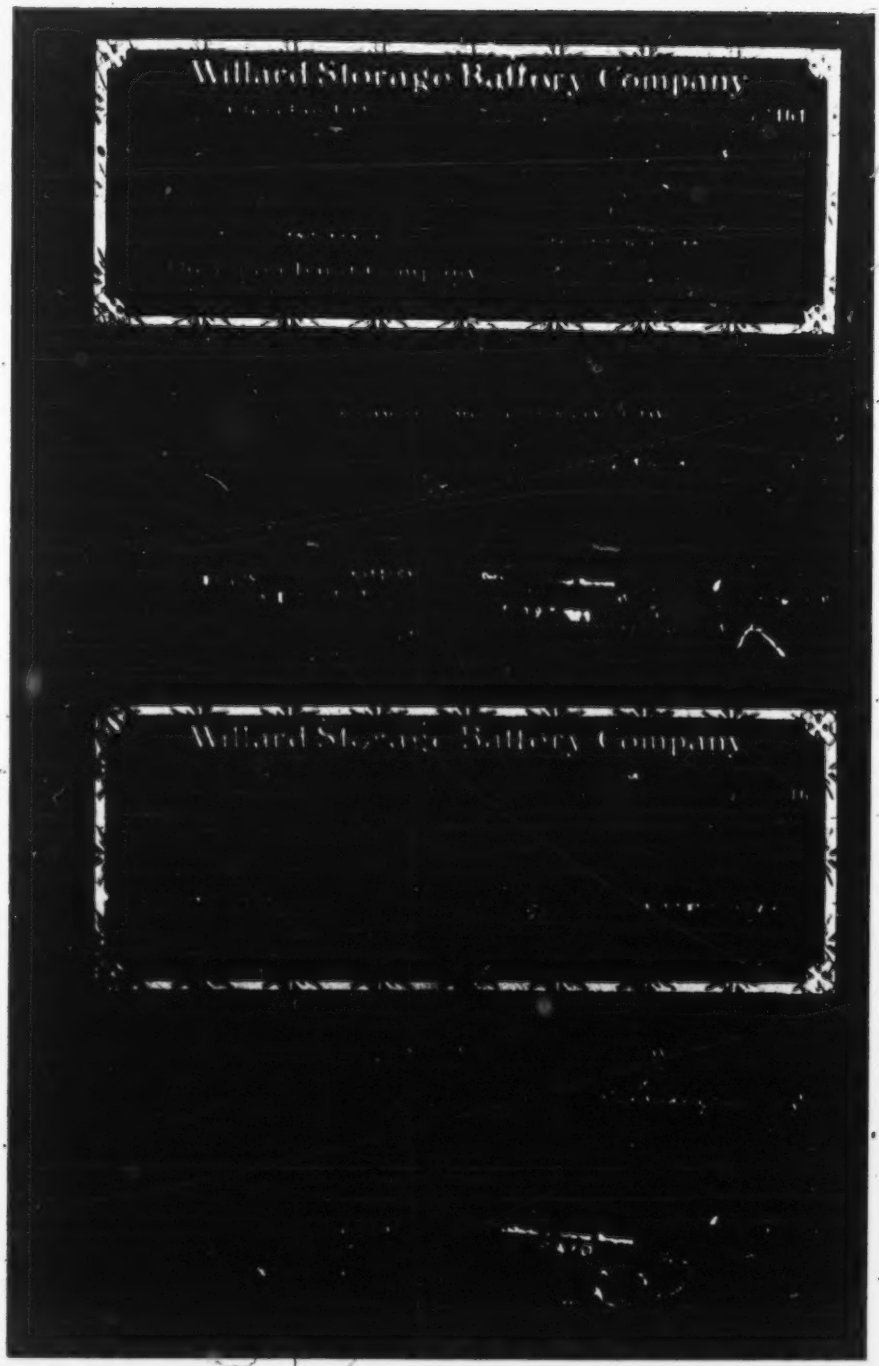
Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of Ohio,
COUNTY OF CUYAHOGA, ss:

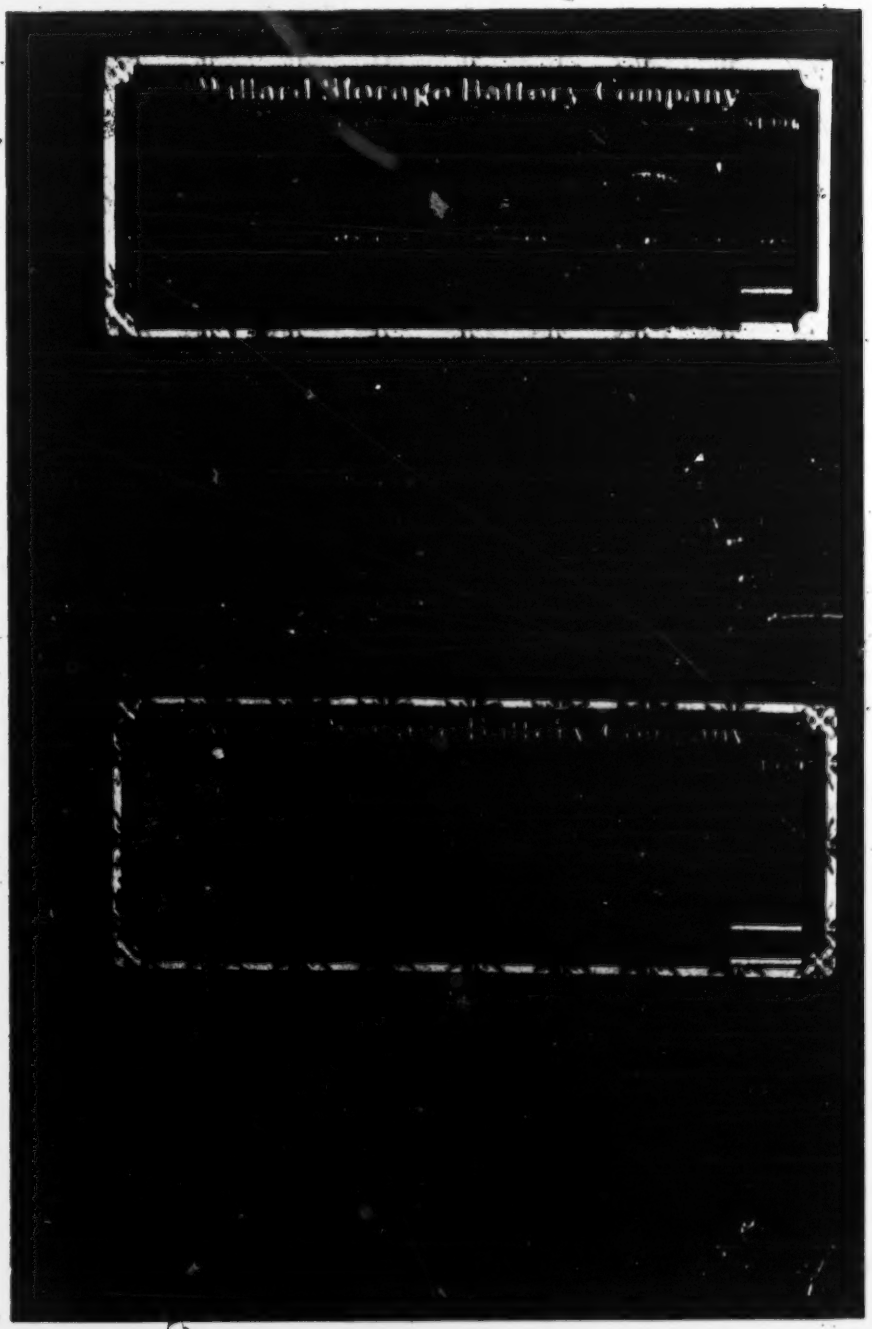
Date received by
Administrative Unit
10/5/26
Stamp here

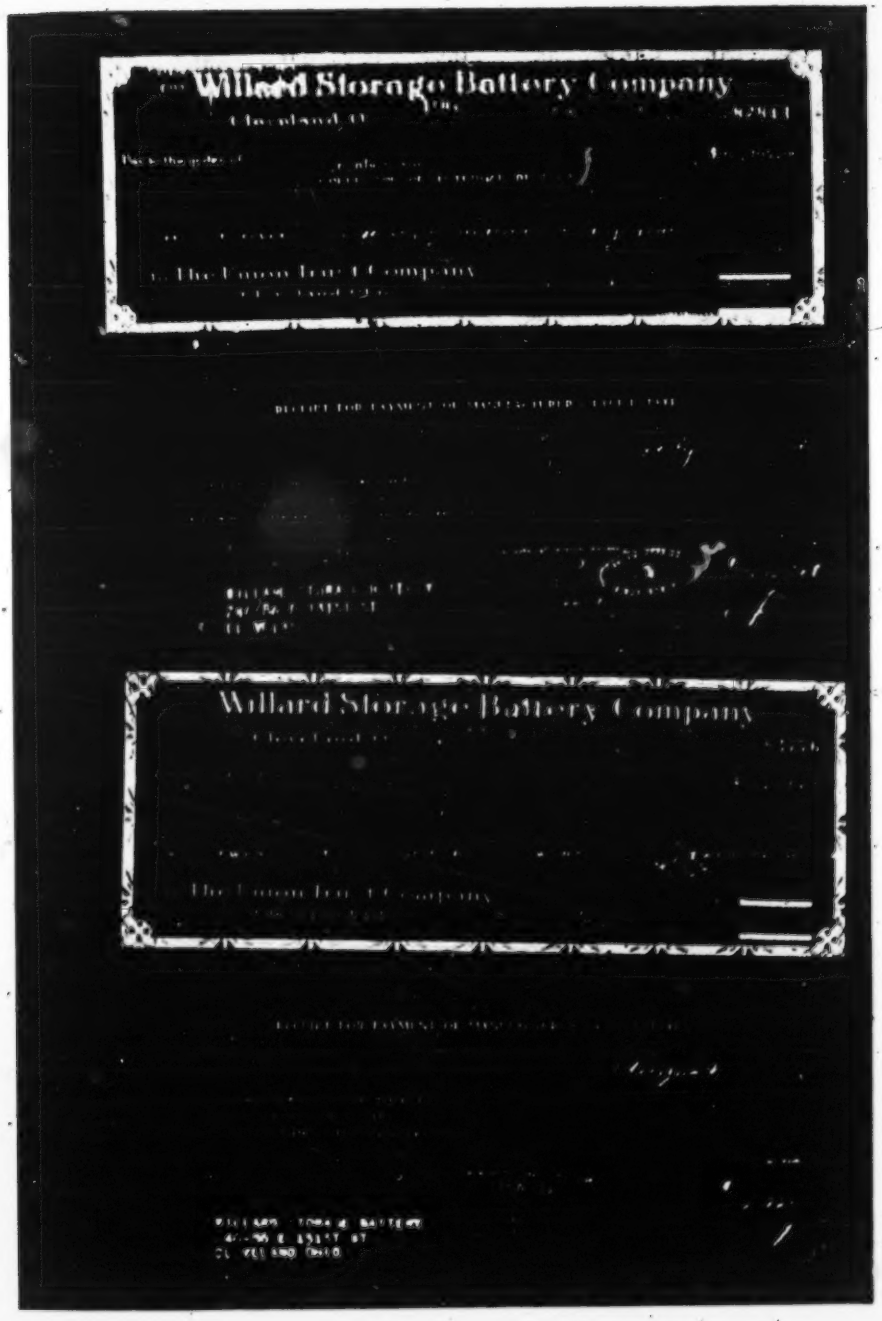


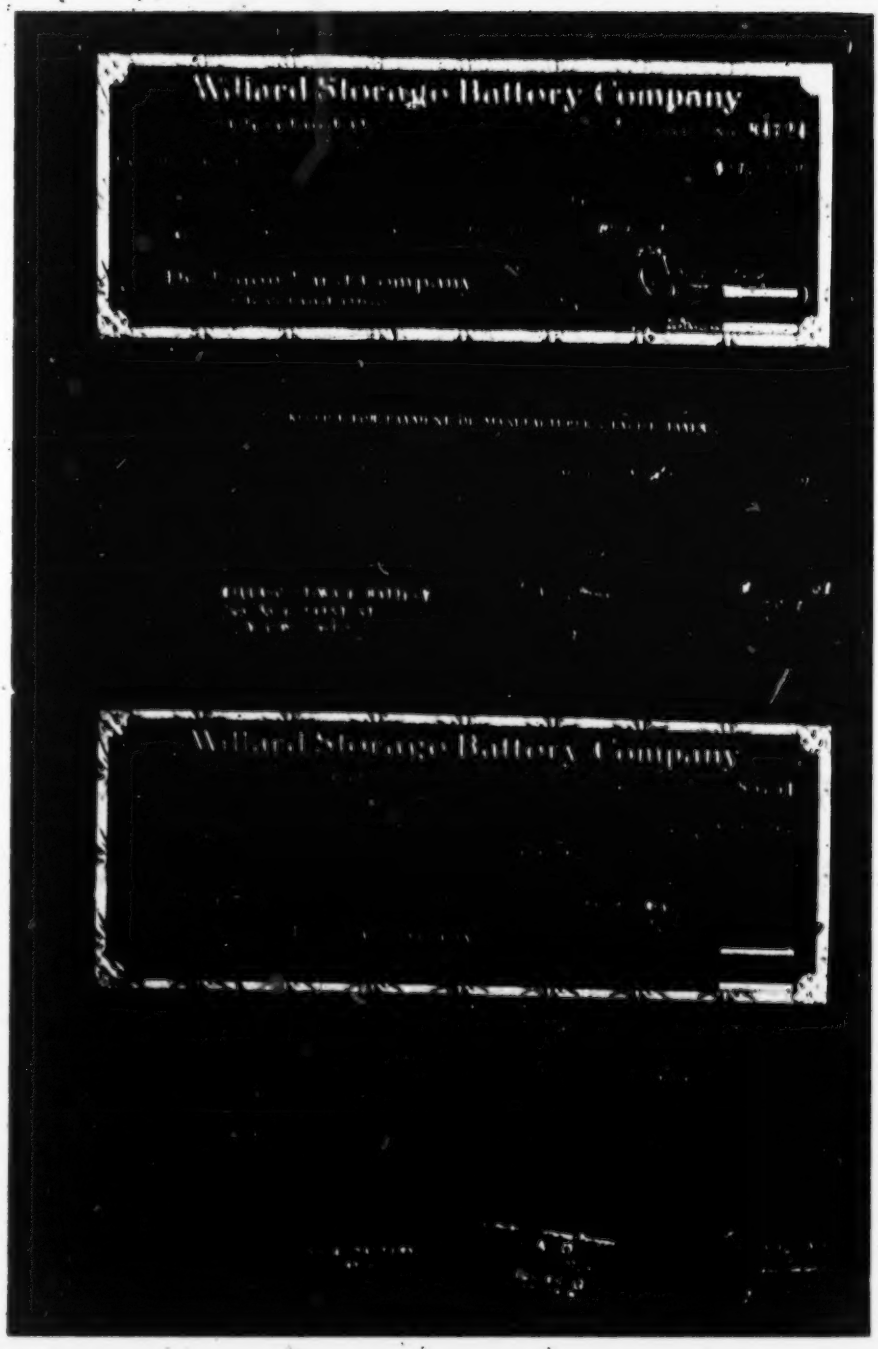
90-1

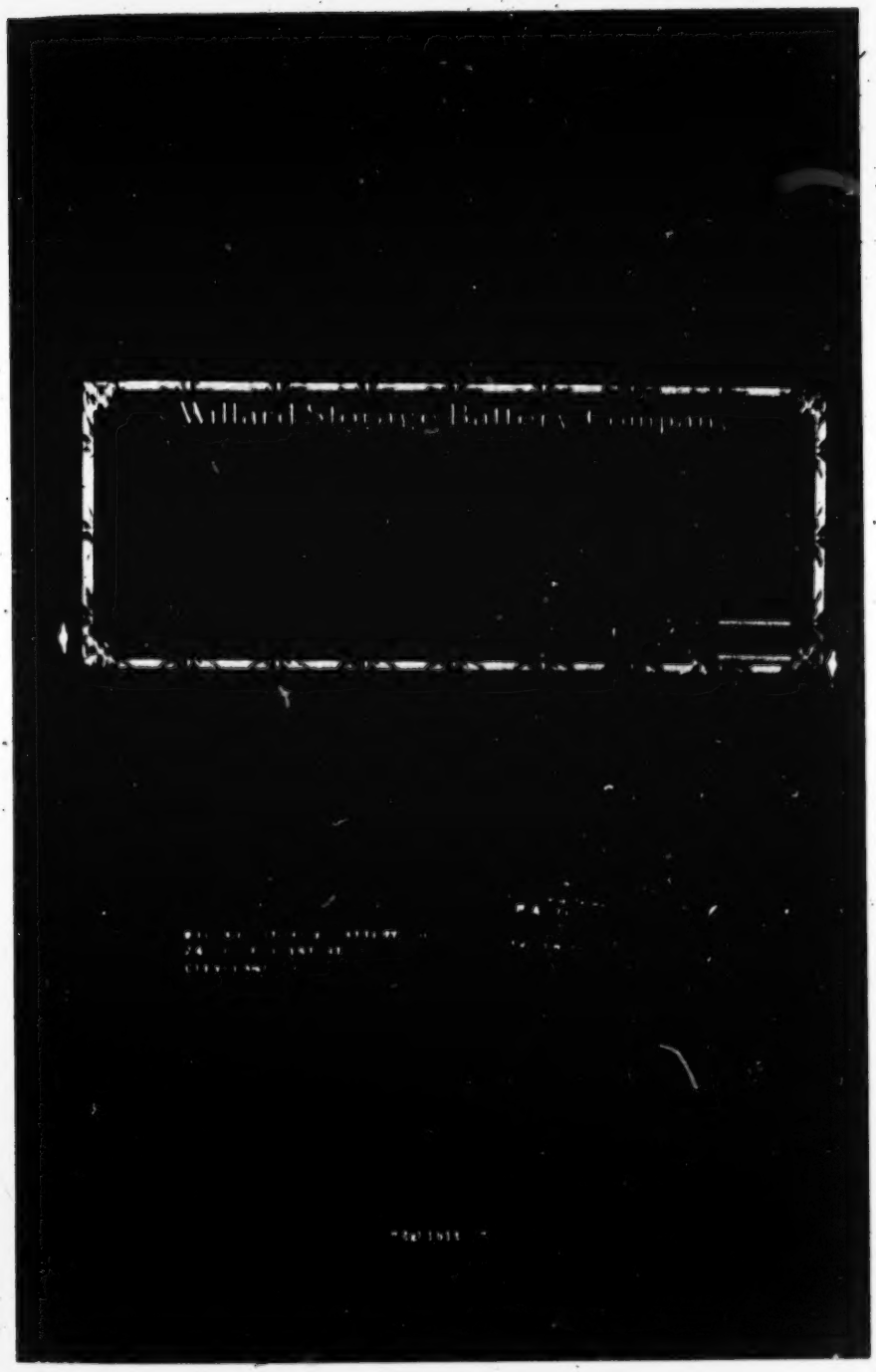

Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company

Willard Storage Battery Company

Type (Name of taxpayer or purchaser of stamps)
Or 246 East 131st Street, Cleveland, Ohio
Print (Residence—give street and number as well as city or town and State)

Same

(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period Year
	From: January 1st, 1924
	To: December 31st, 1924
1. Business in which engaged manufacture of electric storage batteries.	
144 2. Character of assessment or tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)	
3. Amount of assessment	$243,047.28
4. Reduction of tax liability requested (income and profits tax)	
5. Amount to be abated	$
6. Amount to be refunded (or such greater amount as is legally refundable)	$243,047.28
7. Date of payment (see collector's receipts or indorsements of canceled checks)	
(If statement covers income-tax liability items 8–11, inclusive, must be answered.)	
8. District in which return (if any) was filed Cleveland, Ohio.	
9. District in which unpaid assessment appears	
10. Amount of overpayment claimed as credit	$
11. Unpaid assessment against which credit is asked; period from ---------- to ----------	$

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary, and portable. While they are used very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

145 In view of the above facts, we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attached additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PETERS,

(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

Amended claim

(Execute separate form for each tax period).

Treasury Department,	Collector's notation district.
Internal Revenue Service,	Account number.
Form 843—Jan. 1922.	Date received.
Comptroller General U.S.,	Stamp here.
January 18, 1922.	Collector of internal revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
Refund of taxes illegally collected.
Refund of amounts paid for stamps.

Used in error or excess

Important	Notice to collector
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.	Collector must indicate in block above the kind of claim, except in income-tax cases.

146 STATE OF OHIO,
County of Cuyahoga, ss:

Date received by Administrative Unit, 10 5 26. Stamp here.

Willard Storage Battery Company

Type (name of taxpayer or purchaser of stamps).
Or 246 East 131st Street, Cleveland, Ohio.
Print (residence—give street and number as well as city or town and State).

Same

(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: January 1st,	1926
	To: February 26th,	1926
1. Business in which engaged: Manufacture of electric storage batteries.		
2. Character of assessment or tax: Manufacturer's excise tax on batteries; (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$249,275.32
4. Reduction of tax liability requested (income and profits tax)		$
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$249,275.32
7. Dates of payment (see collector's receipts or indorsements of cancelled checks)		
(If statement covers income-tax liability, items 8-11, inclusive, must be answered.)		
8. District in which return (if any) was filed		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked: period from ____ to ____		$

Deponent verily believes that this application should be allowed for the following reasons:

147 This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this ____ day of ____, 19__.

_____

_____

(Title)

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 21, 1927.

Address reply to Commissioner of Internal Revenue, and refer to MT:M:WED C1-S-701.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $249,275.32 paid as manufacturer's excise tax on automobile parts and accessories.

You are requested to advise within 30 days whether you intended to comply with Treasury Decision 4045 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

EM

C. R. NASH,
Acting Commissioner.

148 In United States District Court

Defendant's motion to dismiss

Filed July 8, 1929, in no. 15762

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above-entitled case; that such motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June 1929.

CHARLES C. NORRIS, JR., and
F. C. FRIEND,
Attys. for Plff.

149 In United States District Court

Answer

Filed April 12, 1930, in no. 15762

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, by leave of court first obtained, and for answer to plaintiff's petition, admits the corporate capacity of the plaintiff herein; admits that defendant is the duly appointed, qualified, and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

Defendant admits that prior to December 1, 1922, and from that date continuously to the present time, plaintiff has been and now is engaged in the manufacture and sale of electric storage batteries at its said plant at 246 East 131st Street, Cleveland, Ohio.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition, admitting the allegation that all of said sales upon which tax was paid were made to persons other than manufacturers of automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies the allegation contained in paragraph 6 of plaintiff's petition that the electric storage batteries, upon the selling prices of which the said taxes were paid by the plaintiff, were commercial commodities; defendant denies each and every other allegation contained therein.

Defendant denies all of the allegations contained in paragraphs 7, 8, and 9 of plaintiff's petition.

Defendant admits the allegations contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes paid on electric storage batteries for the taxable periods beginning
150 January 1, 1923, and ending on December 31, 1923, in the sum of $243,047.28, and further says that said claim for refund was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

Defendant admits that plaintiff filed an amended claim for refund with the Commissioner of Internal Revenue for said taxable period, but denies that said amended claim for refund was filed on November 3, 1926, but was filed on October 29, 1926, for the sum of $249,275.32. Defendant further says that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

Defendant denies that said manufacturers excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $249,275.32 with interest, or any sum whatsoever, by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928 plaintiff is deprived of the right of refund of manufacturers excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore defendant prays that plaintiff's petition be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

[*Duly sworn to by Wilfred J. Mahon; jurat omitted in printing.*]

151 Copy sent counsel for pltff. 4-11-30.

W. J. MAHON.

Routzahn v. Willard Storage.

In United States District Court

Order consolidating case no. 15762 law with nos. 15761-3-4-5 for trial only

Entered May 14, 1931, in no. 19762, by West, Judge

It is ordered that this case be consolidated with cases 15761,.15763, 15764 and 15765 law for trial only.

152 In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15762

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice

to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any Governmental Department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1922 to November 1923, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

153

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec	1922	Jan	1923	50	1	$22,486.39	1/30/23
Jan	1923	Feb	"	71	0	15,076.44	2/29/23
Feb	"	Mar	"	60	2	22,133.63	3/30/23
Mar	"	Apr	"	52	8	31,792.23	4/27/23
Apr	"	May	"	60	5	25,920.09	5/31/23
May	"	June	"	58	8	14,657.74	6/30/23
June	"	July	"	53	0	15,790.62	7/31/23
July	"	Aug	"	49	5	12,705.08	8/30/23
Aug	"	Sept	"	44	5	22,826.28	9/29/23
Sept	"	Oct	"	59	3	17,912.98	10/31/23
Oct	"	Nov	"	52	5	26,236.87	11/30/23
Nov	"	Dec	"	52	7	21,730.97	12/29/23

6. On October 5, 1926, plaintiff filed its claim for refund no. 21168 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods January 1923 to December 1923, inclusive, in the amount of $243,047.28, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its amended claim for refund no. 701 of manufacturer's excise tax so paid on the manufacture and

sale of electric storage batteries for the taxable periods January 1923 to November 1923, inclusive, in the amount of $249,275.32, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8: Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, Jr.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector,*
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN,
Asst. U.S. Atty.
E. F. McMAHON, *Special Atty.*

154 In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15762, by West, Judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

In United States District Court

Trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15762, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

155 In United States District Court

Waiver of jury

Filed March 9, 1931, in no. 15762

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

In United States District Court

Order of judgment

Entered October 27, 1931, in no. 15762, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to, on due consideration of the premises it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $249,275.32, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check, to wit:

156 $22,486.39 from January 30, 1923; $15,076.44 from February 28, 1923; $22,133.63 from March 30, 1923; $31,792.23 from April 27, 1923; $25,920.09 from May 31, 1923; $14,657.74 from June 30, 1923; $15,790.62 from July 31, 1923; $12,705.08 from August 30, 1923; $22,826.23 from September 29, 1933; $17,912.98 from October 31, 1923; $26,236.87 from November 30, 1923; $21,736.97 from December 29, 1923.

It is further ordered that plaintiff recover its costs herein expended, taxed at $----------.

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

S. H. WEST, *Judge.*

Approved:
W. J. MAHON, *U.S. Atty.*

In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15762

The court having rendered judgment herein in favor of the plaintiff in the amount of $249,275.32, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified, and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the
157 said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise, and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Petition

Filed May 21, 1929, in no. 15763

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $189,853.88, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to December 1, 1923, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the Stte of Ohio, in the United States of America.

158 2. On or about December 1, 1923, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eighteenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the northern district of Ohio, eastern division.

3. Prior to December 1, 1923, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on December 1, 1923, and ending on November 30, 1924, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles, or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the defendant made a return in accordance with the provisions of title IX, section 900, of the United States Revenue Act of 1921 after computation of manufacturer's excise taxes at the rate of five (5) per centum and under title VI, section 600, of the United States Revenue Act of 1924 of the computation of manufacturer's excise taxes at the rate of two and one half (2½) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of five (5) or two and one half (2½) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the
159 said returns is hereunto attached, marked "Exhibit A", and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "exhibit B", and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in "exhibit B", which said sums of money amounted in the aggregate to the sum of $189,853.88, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in "exhibit B." All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between December 1, 1923, and November 30, 1924, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the
160 year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motorcycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915 electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motor boats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, turret lighting and auxiliary power, signalling devices in railroad systems and in military service, search lights, telephone service, isolated lighting and power plants, street railways, fire alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1923, and ending on November 30, 1924, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title IX, section 900 of the United States Revenue Act of 1921 or in subdivision (1) or (2) of title VI, section 600 of the United States Revenue Act of 1924, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said

sales the sum of $189,853.88 as set forth in "exhibit B" hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant, as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant,
161 and represented the payment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1924, and ending on December 31, 1924, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F", and made part hereof.

13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant, in the sum of $189,853.88, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in "exhibit B", hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY,
CHARLES C. NORRIS, JR., *Philadelphia, Pa.*
By F. C. FRIEND, *Its Attorneys.*

162 [Duly sworn to by C. H. Gibney, jurat omitted in printing.]

PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount

claimed $189,853.88 with interest at the rate of 6% per annum as provided by law on the following sums from the following dates, respectively: On $16,258.35 from January 30, 1924; on $21,221.02 from February 28, 1924; on $24,783.60 from March 28, 1924; on $27,383.15 from April 29, 1924; on $16,773.84 from May 28, 1924; on $12,834.43 from June 27, 1924; on $11,828.40 from July 29, 1924; on $7,736.48 from August 29, 1924; on $10,577.00 from September 29, 1924; on $12,768.27 from October 30, 1924; on $14,910.29 from November 28, 1924; on $12,779.05 from December 30, 1924, and costs.

CHARLES C. NORRIS, JR.,
Philadelphia, Pa., &
F. C. FRIEND,
Counsel for Plaintiff:

Note re exhibit A

Printer's note:

This exhibit being identical with exhibit A attached to petition in case no. 15761, it has been omitted to comply with the rule against duplication (see page 8 of this record.)

163 *Exhibit "B" to petition*

Month of sales	Date of payment	Amount of tax paid
1923, December	1924, January 30	$16,258.35
1924, January	" February 28	21,221.02
" February	" March 28	24,783.60
" March	" April 29	27,383.15
" April	" May 28	16,773.84
" May	" June 27	12,834.43
" June	" July 29	11,828.40
" July	" August 29	7,736.48
" August	" September 29	10,577.00
" September	" October 30	12,768.27
" October	" November 28	14,910.29
" November	" December 30	12,779.05
		$189,853.88

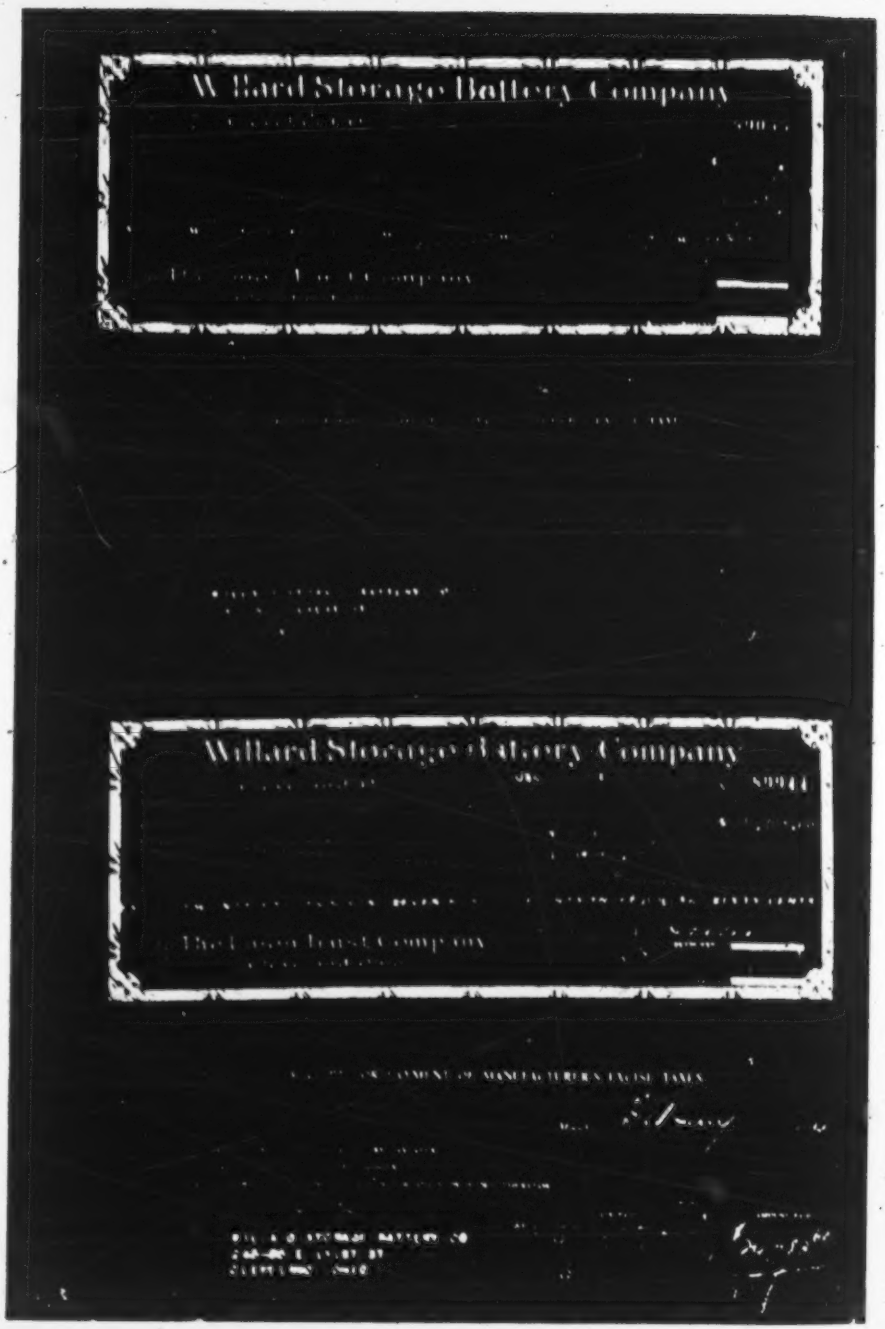
171 *Exhibit "D" to petition*

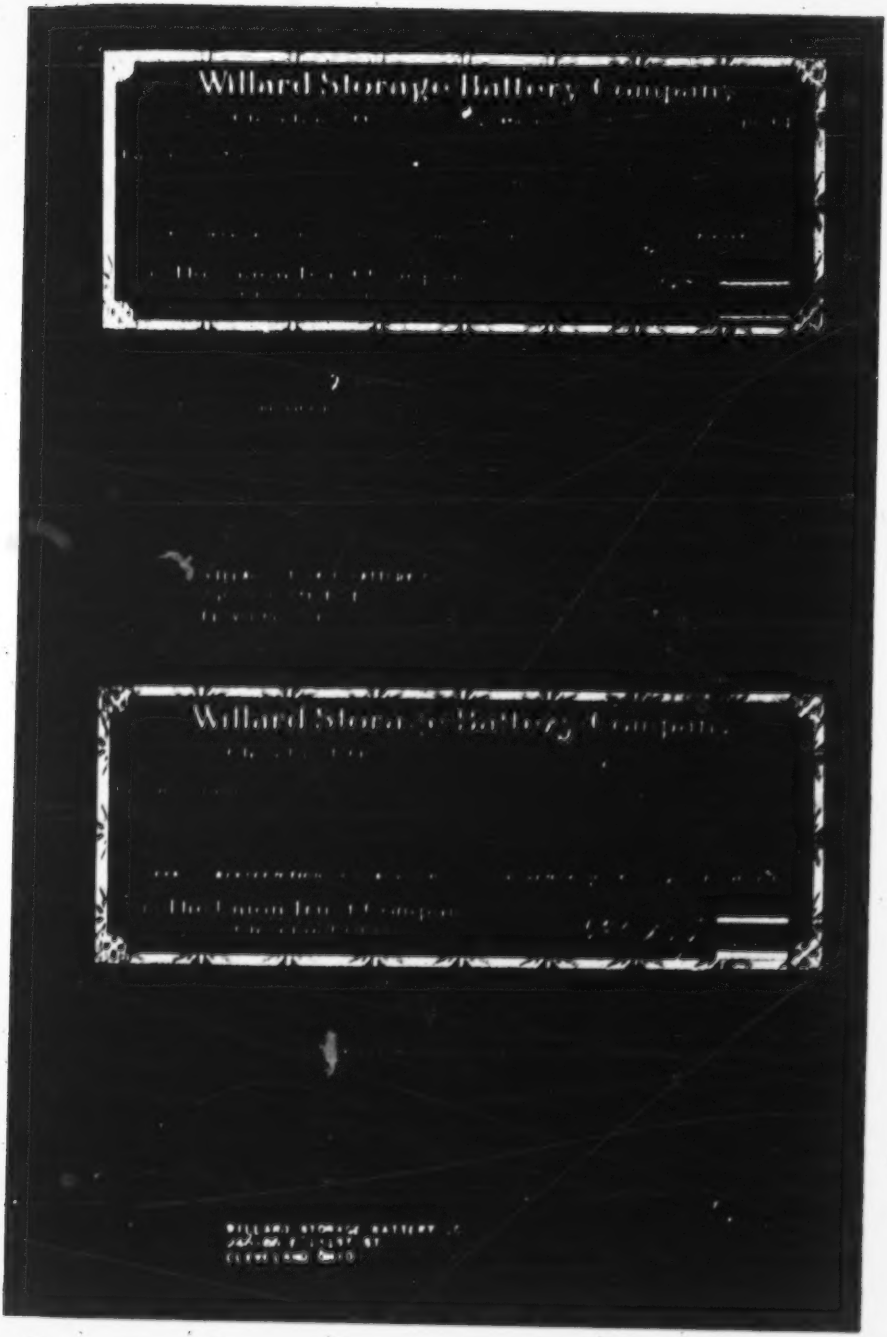
(Execute separate form for each tax period)

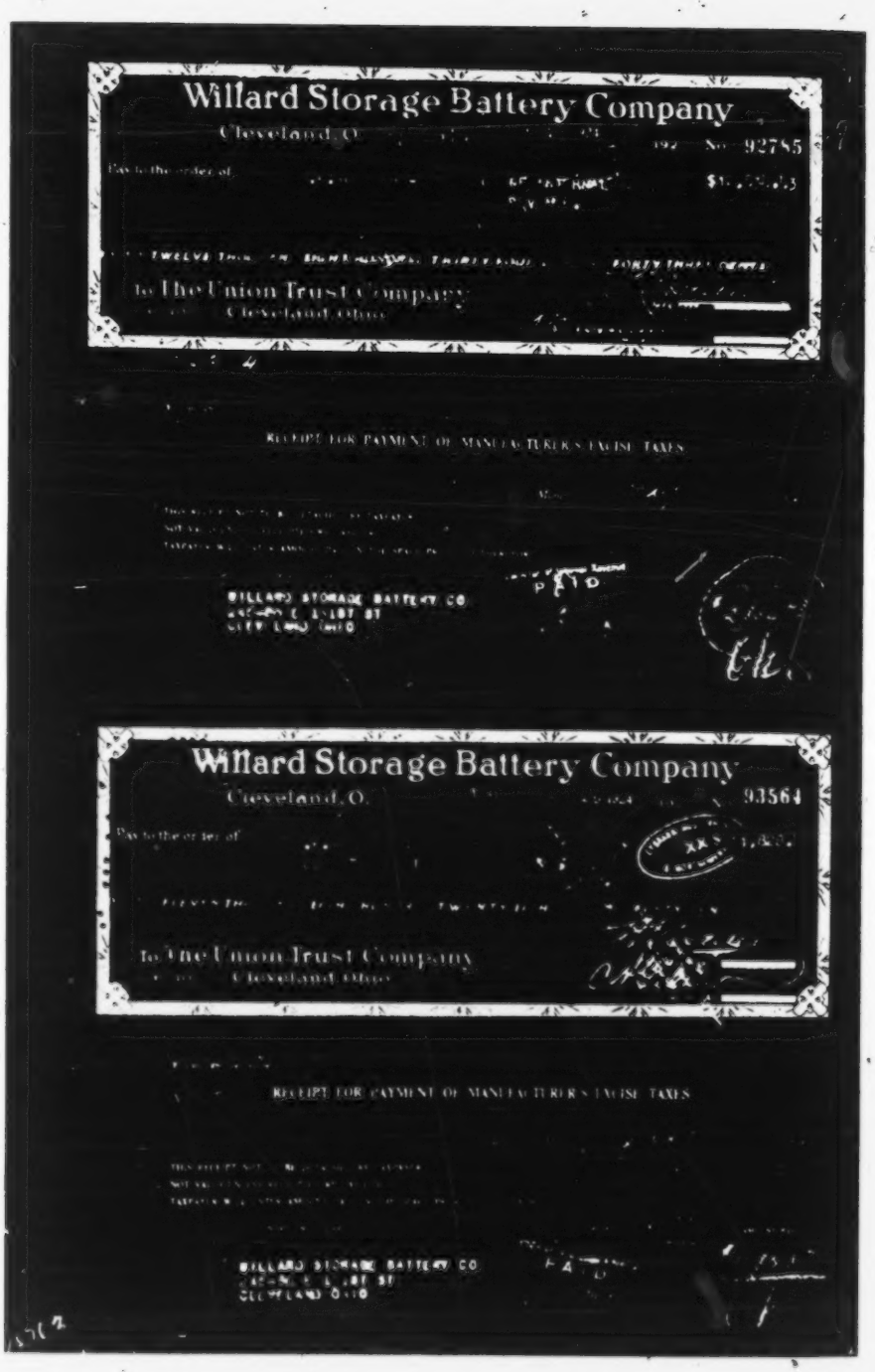
Treasury Department,
Internal Revenue Service,
Form 843—Jan., 1922.
Comptroller General U.S.,
January 18, 1922.

Collector's Notation
District.
Account number.
Date received.
Stamp here.
Collector of Internal Revenue.


Willard


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company



Willard Storage Battery Company

Cleveland, O. 192 No. 92785

Pay to the order of $

to The Union Trust Company

Cleveland, Ohio

RECEIPT FOR PAYMENT OF MANUFACTURERS EXCISE TAXES

WILLARD STORAGE BATTERY CO

CLEVELAND, OHIO

Willard Storage Battery Company

Cleveland, O. 93564

Pay to the order of

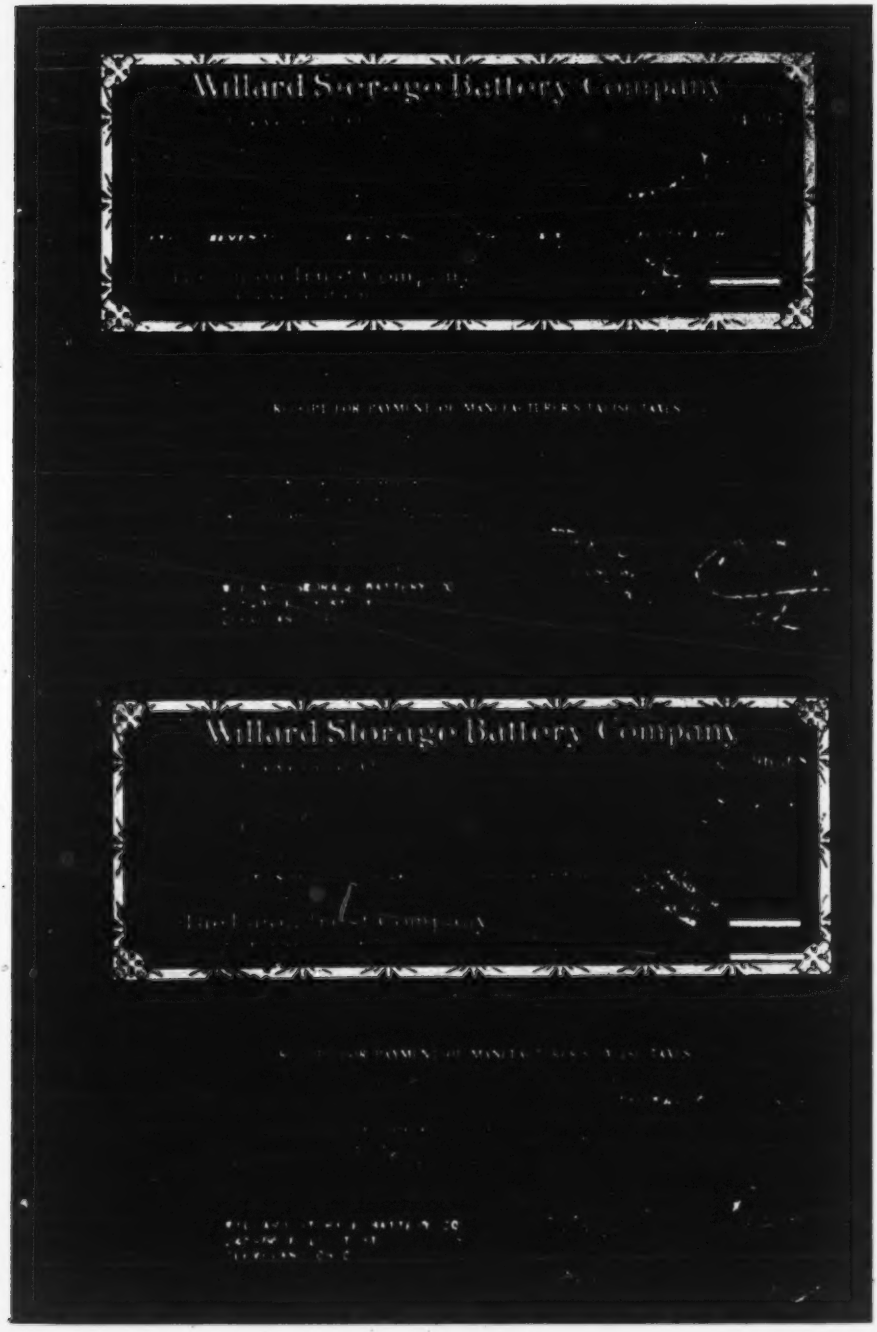
to The Union Trust Company

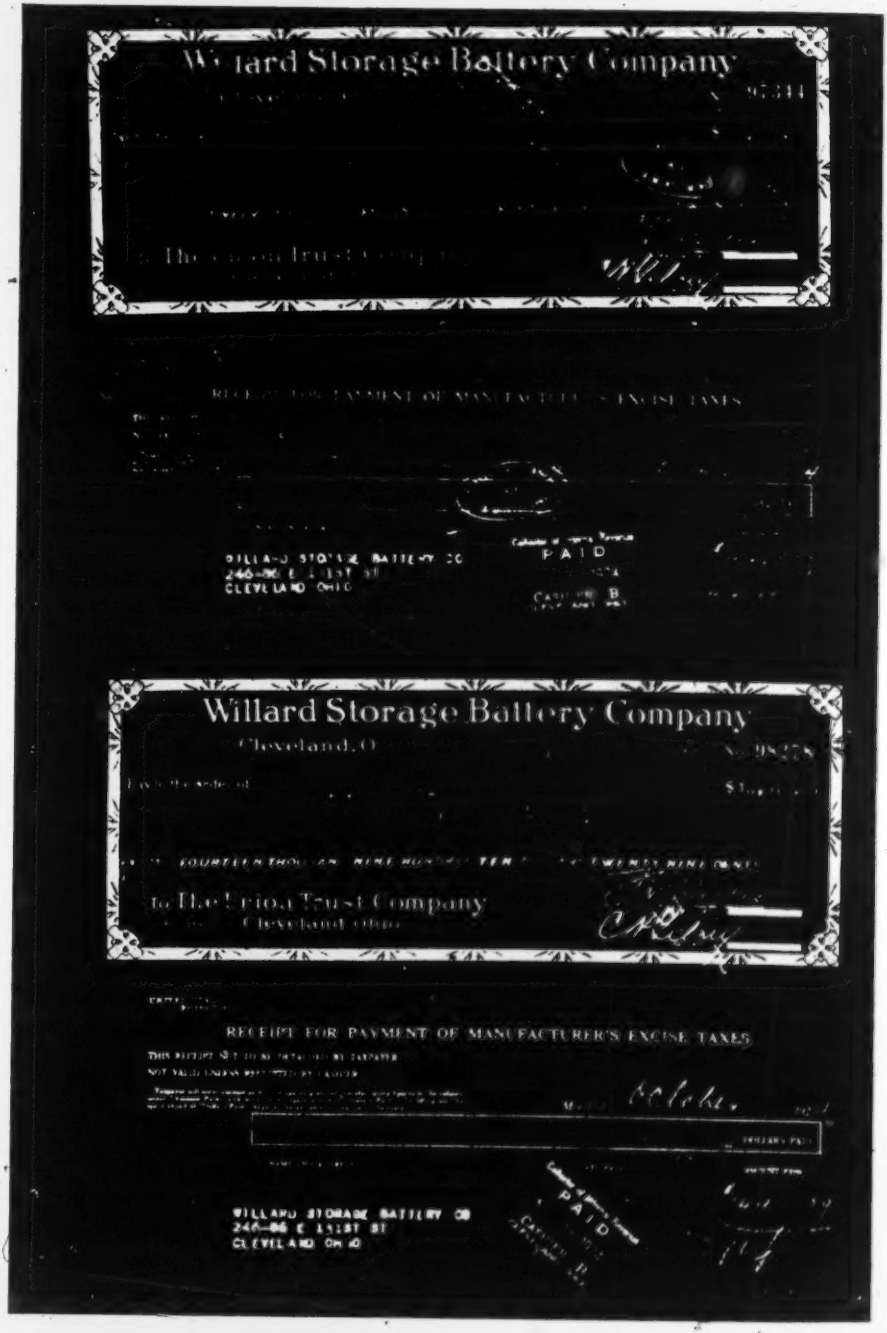
Cleveland, Ohio

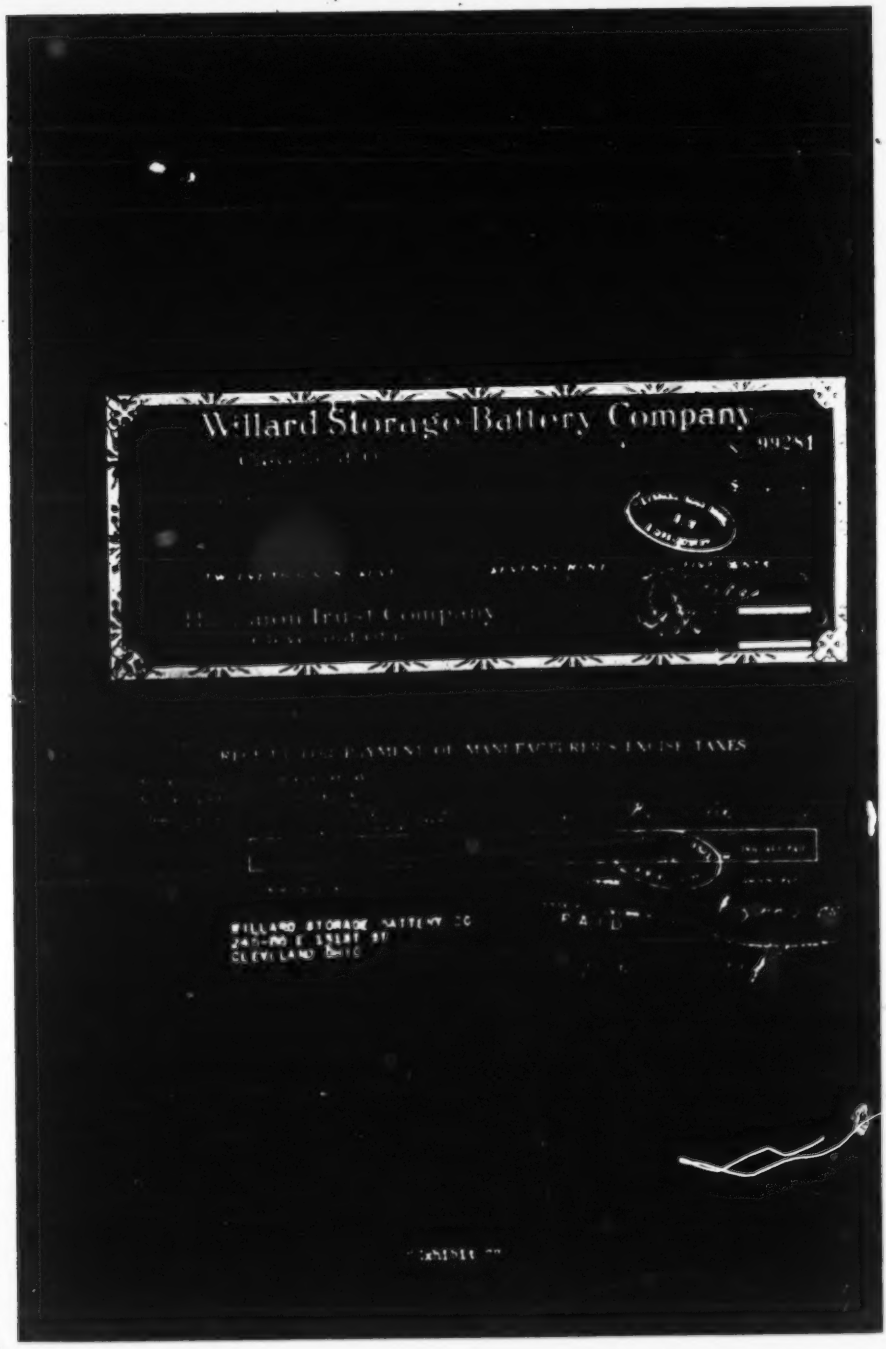
RECEIPT FOR PAYMENT OF MANUFACTURERS EXCISE TAXES

WILLARD STORAGE BATTERY CO

CLEVELAND, OHIO


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
PAID
Willard Storage Battery Company
Cleveland, O
to The Cleveland Trust Company
Cleveland, Ohio
RECEIPT FOR PAYMENT OF MANUFACTURER'S EXCISE TAXES
WILLARD STORAGE BATTERY CO
246-86 E 131ST ST
CLEVELAND OHIO
PAID


Willard Storage Battery Company
99281
PAID

Claim for

Abatement of Tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps, used in error or excess.

Important — File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector — Collector must indicate in block above the kind of claim, except in income-tax cases.

State State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative Unit 10/5/26
Stamp here.

Willard Storage Battery Company

Type or print (Name of taxpayer or purchaser of stamps).
246 East 131st street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State).
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: January 1st,	1924
	To: December 31st,	1924
1. Business in which engaged manufacture of electric storage batteries.		
172 2. Character of assessment or tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$188,448.16
4. Reduction of tax liability requested (income and profit tax)		$
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$188,448.16
7. Dates of payment (see collector's receipts or indorsements of cancelled checks)		
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed Cleveland, Ohio.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked; period from ——— to ———		$

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing

this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary, and portable. While they are used very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radio, laboratory work, and in various other situtaions when small electric power is required.

In view of the above facts, we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47,
173 under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PETERS,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revnue or revenue agent without charge.)

Exhibit "E" to petition

Amended claim

(Execute separate form for each tax period)

Treasury Department.	Collector's notation district.
Internal Revenue Service, Form 843—Jan. 1922.	Account number.
	Date received.
Comptroller General U.S., January 18, 1922.	Stamp here.
	Collector of internal revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important	Notice to collector
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.	Collector must indicate in block above the kind of claim, except in income tax cases.
State of Ohio,	Date received by administrative unit.
County of Cuyahoga, ss:	----------
	Stamp here.

174 Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period / Year
	From: January 1st, 1924 / To: December 31st, 1924
1. Business in which engaged, manufacture of electric storage batteries.	
2. Character of assessment or tax, manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)	
3. Amount of assessment	$189,853.88
4. Reduction of tax liability requested (income and profits tax)	$----------
5. Amount to be abated	$----------
6. Amount to be refunded (or such greater amount as is legally refundable)	$189,853.88
7. Dated of payment (see collector's receipts or indorsements of canceled checks)	----------
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)	
8. District in which return (if any) was filed	----------
9. District in which unpaid assessment appears	----------
10. Amount of overpayment claimed as credit	$----------
11. Unpaid assessment against which credit is asked; period from -------- to	$----------

Deponent verily believes that this application should be allowed for the following reasons:

This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attached additional sheets if necessary.)

(Signed) F. J. STILES.

175 Sworn to and subscribed before me this 28th day of October, 1926.

(Title)----------

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT.
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington.

Address reply to Commissioner of Internal Revenue, MT:M: WED C1-S-702.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $189,853.88 paid as manufacturer's excise tax on automobile parts and accessories.

You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

C. R. NASH,
Acting Commissioner.

EM

176 In United States District Court

Defendant's motion to dismiss

Filed July 8, 1929, in no. 15763

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above-entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provided an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above entitled case; that said motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June, 1929.

CHARLES C. NORRIS, JR., AND F. C. FRIEND,
Attys. for Plff.

177 In United States District Court

Answer

Filed April 12, 1930, in no. 15763

Now comes Wilfred J. Mahon, United States attorney for the Northern District of Ohio, on behalf of the defendant herein, by leave of court first obtained, and for answer to plaintiff's petition admits the corporate capacity of the plaintiff herein; admits that defendant is duly appointed, qualified and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

Defendant admits the allegations contained in numbered paragraphs 1, 2, and 3 of plaintiff's petition.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition admitting also the allegation that all of said sales of electric storage batteries upon which tax was paid, were made to persons other than manufacturers of automobile trucks, automobile wagons, motor cycles, and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies all the allegations contained in paragraph 6 of plaintiff's petition especially that the allegation that said electric storage batteries were commercial commodities and were not specifically designed nor primarily adaptable for use on or in connection with automobile trucks, automobile wagons, motor cycles, and other automobiles.

Defendant denies the allegations contained in paragraphs 7, 8, and 9 of plaintiff's petition.

Defendant admits the allegations contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue, a claim for refund of manufacturers excise taxes collected from plaintiff during the taxable periods beginning January 1, 1924, and ending on December 1, 1924, inclusive, and says that said claim for refund was in the amount of $188,448.16 and that said claim for refund was
178 duly rejected by the Commissioner of Internal Revenue on June 25, 1929. Defendant admits that plaintiff filed with the Commissioner of Internal Revenue, an amended claim for refund of manufacturers excise taxes paid by plaintiff during said taxable periods, and denies that said amended claim for refund was filed on November 3, 1926, but says that said amended claim for refund was filed on October 29, 1926, and that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

Defendant denies that said manufacturers excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $189,853.88 with interest, or any sum whatsoever by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right of refund of manufacturers excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921, and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

[*Duly sworn to by Wilfred J. Mahon; jurat omitted in printing.*]

179 Copy sent counsel for pltff.

W. J. MAHON.

In United States District Court

Order consolidating case no. 15763 with cases nos. 15761-2-4-5 for trial only

Entered May 14, 1931, in no. 15763, by West, Judge

It is ordered that this case be consolidated with cases nos. 15761, 15762, 15764, and 15765, law for trial only.

In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15763

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized,
180 existing and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed qualified and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any governmental department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1923 to November 1924, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec.	1923	Jan.	1924	58	1	$16,258.35	1/31/24
Jan.	1924	Feb.	"	57	8	21,221.02	2/29/24
Feb.	"	Mar.	"	50	5	24,783.60	3/29/24
Mar.	"	Apr.	"	53	7	27,383.15	4/30/24
Apr.	"	May	"	53	4	16,773.84	5/29/24
May	"	June	"	51	7	12,834.43	6/28/24
June	"	July	"	48	6	11,828.40	7/30/24
July	"	Aug.	"	36	4	7,736.48	8/30/24
Aug.	"	Sept.	"	24	1	10,577.00	9/30/24
Sept.	"	Oct.	"	28	3	12,768.27	10/31/24
Oct.	"	Nov.	"	22	9	14,910.29	11/29/24
Nov.	"	Dec.	"	28	6	12,779.05	12/31/24

6. On October 5, 1926, plaintiff filed its claim for refund no. 21167 of manufacturer's excise tax so paid on the manufacture
181 and sale of electric storage batteries for the taxable periods January 1924 to December 1924, inclusive, in the amount of

$188,448.16, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On Ocober 29, 1926, plaintiff filed its claim for refund no. 702 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods December 1923 to November 1924, inclusive, in the amount of $189,853.88, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, Jr.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector*,
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN, *Asst. U.S. Atty.*
E. F. McMAHON, *Special Atty.*

182 In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15763, by West, judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

In United States District Court

Trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15763, by West, judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of

the testimony adduced on behalf of the parties, took the cause under advisement.

183 IN UNITED STATES DISTRICT COURT

Waiver of jury

Filed March 9, 1931, in no. 15763

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

Order of judgment

Entered Oct. 27, 1931, in no. 15763, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to, on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $189,853.88, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than 30 days earlier than that of the refund check, to wit:

184 $16,258.35 from January 31, 1924; $21,221.02 from February 29, 1924; $24,783.60 from March 29, 1924; $27,383.15 from April 30, 1924; $16,773.84 from May 29, 1924; $12,834.43 from June 28, 1924; $11,828.40 from July 30, 1924; $7,736.48 from August 30, 1924; $10,577.00 from September 30, 1924; $12,768.27 from October 31, 1924; $14,910.29 from November 29, 1924; $12,779.05 from December 31, 1924.

It is further ordered that plaintiff recover its costs herein expended, taxed at $------

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved:

W. J. MAHON, *U. S. Atty.*

IN UNITED STATES DISTRICT COURT

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15763

The court having rendered judgment herein in favor of the plaintiff in the amount of $189,853.88, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by
185 the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Petition

Filed May 31, 1929, in no. 15764

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $173,934.45, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to December 1, 1924, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about December 1, 1924, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eight-
186 eenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the northern district of Ohio, eastern division.

3. Prior to December 1, 1924, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at No. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month during the period beginning on December 1, 1924, and ending on November 30, 1925, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the defendant made a return in accordance with the provisions of title VI, section 600 of the United States Revenue Act of 1924, of the computation of manufacturer's excise taxes at the rate of two and one half (2½) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of two and one half (2½) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A" and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B" and made part hereof, the plaintiff paid to the defendant, and the defendant collected
187 from the plaintiff, the sums of money set opposite each of the several dates as set forth in "Exhibit B", which said sums of money amounted in the aggregate to the sum of $173,934.45, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in exhibit B. All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor

primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between December 1, 1924, and November 30, 1925, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motorcycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

188 8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motor boats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery-gun firing, lighting, turret lighting and auxiliary power, signalling devices in railroad systems and in military service, searchlights, telephone service, isolated lighting and power plants, street railways, fire-alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1924, and ending on November 30, 1925, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title VI, section 600 of the United States Revenue Act of 1924, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such, manufacturer's excise taxes upon said sales the sum of $173,954.45 as set forth in exhibit B hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by

the plaintiff to, and upon the demand of, the defendant, as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant, and represented th epayment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff upon the demand of the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly
189 filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1925, and ending on December 31, 1925, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F" and made part hereof.

13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in the sum of $173,934.45, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in exhibit B hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY,
CHARLES C. NORRIS, Jr., *Philadelphia, Pa.*
By F. C. FRIEND, *its Attorneys.*

[*Duly sworn to by C. H. Gibney, jurat omitted in printing.*]

190 PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $173,934.45 with interest at the rate of 6% per annum as provided by law on the following sums from the following dates re-

spectively: On $14,852.63 from January 29, 1925; on $8,363.97 from February 27, 1925; on $11,588.18 from March 30, 1925; on $11,923.08 from April 29, 1925; on $6,639.61 from May 28, 1925; on $6,635.54 from June 29, 1925; on $7,861.95 from July 30, 1925; on $15,760.86 from August 28, 1925; on $18,811.15 from September 29, 1925; on $22,705.71 from October 30, 1925; on $25,802.53 from November 30, 1925; on $21,989.24 from December 30, 1925, and costs.

CHARLES C. NORRIS, Jr.,
Philadelphia, Pa.
F. C. FRIEND,
Counsel for Plaintiff.

Note re exhibit A

Printer's note:

This exhibit being identical with exhibit A, attached to petition in case no. 15761, it has been omitted to comply with the rule against duplication. (See page 8 of this record.)

Exhibit "B" to petition

Month of sales	Date of payment	Amount of tax paid
1924 December	1925 January 29	$14,852.63
1925 January	" February 27	8,363.97
" February	" March 30	11,588.18
" March	" April 29	11,923.08
" April	" May 28	6,639.61
" May	" June 29	6,635.54
" June	" July 30	7,861.95
" July	" August 28	15,760.86
" August	" September 29	18,811.15
" September	" October 30	22,705.71
" October	" November 30	26,802.53
" November	" December 30	21,989.24
		173,934.45

198 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
District
Account number
Date received
Stamp here
Collector of
internal revenue

EXHIBIT-C

Willard Storage Battery Company

Cleveland, O. [illegible] 21[illegible] No. 99894

Pay to the order of [illegible] $[illegible]

[illegible] FOURTEEN THOUSAN[illegible] DOLLARS

To The Union Trust Company
Cleveland Ohio

[illegible]

RECEIPT FOR PAYMENT OF MANUFACTURER'S EXCISE TAXES

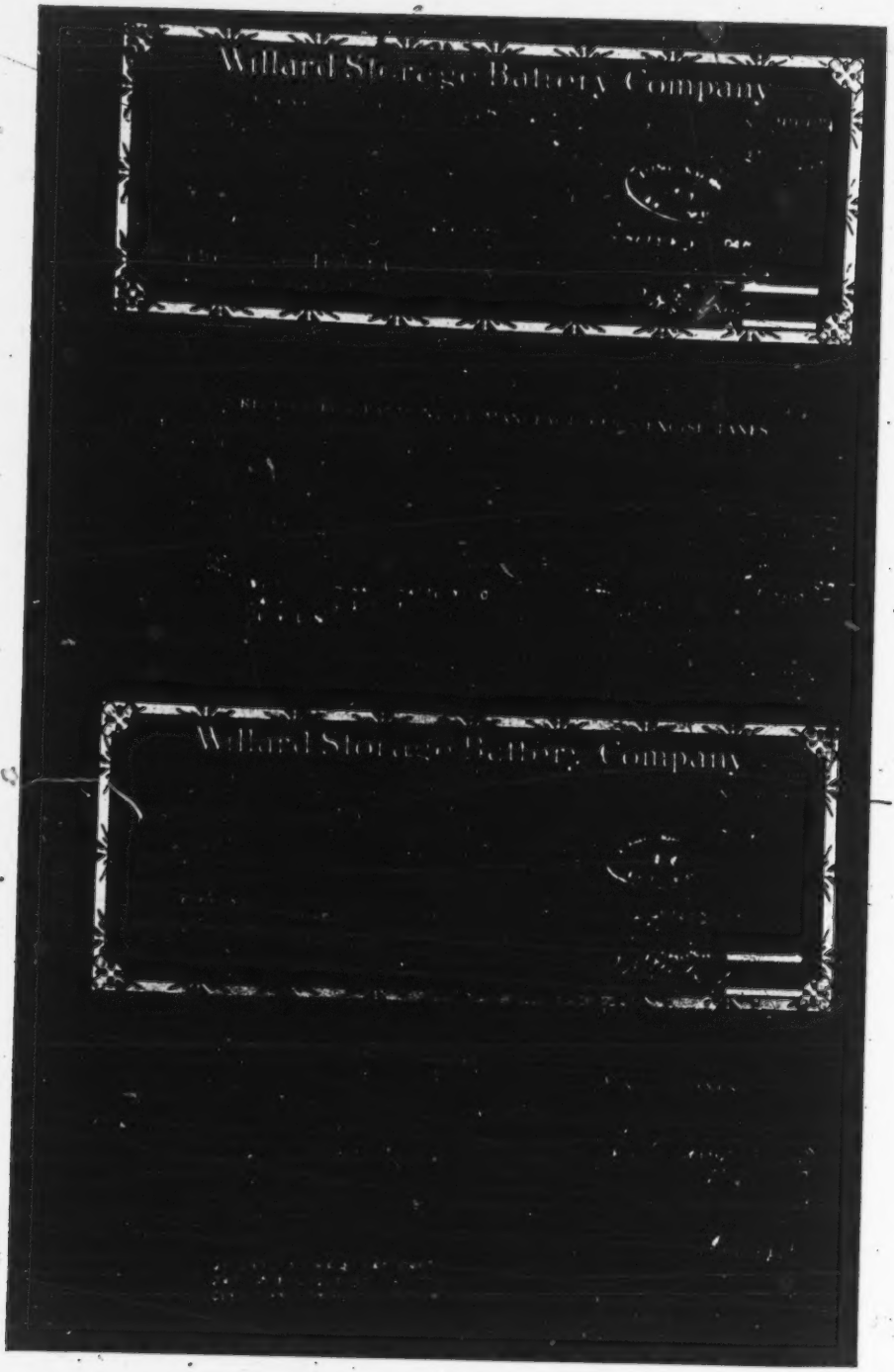
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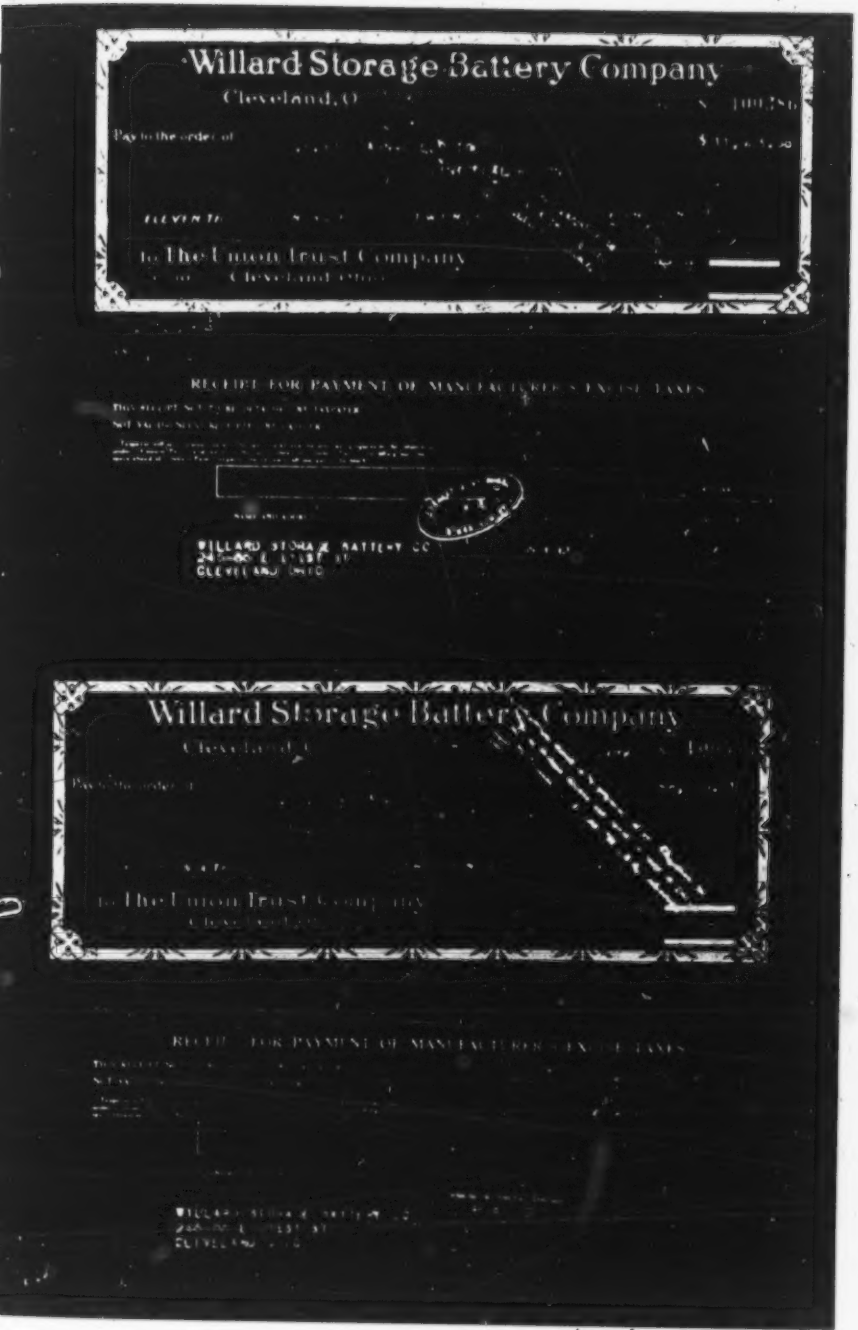
WILLARD STORAGE BATTERY CO
240[illegible] E 152ST ST
[illegible]

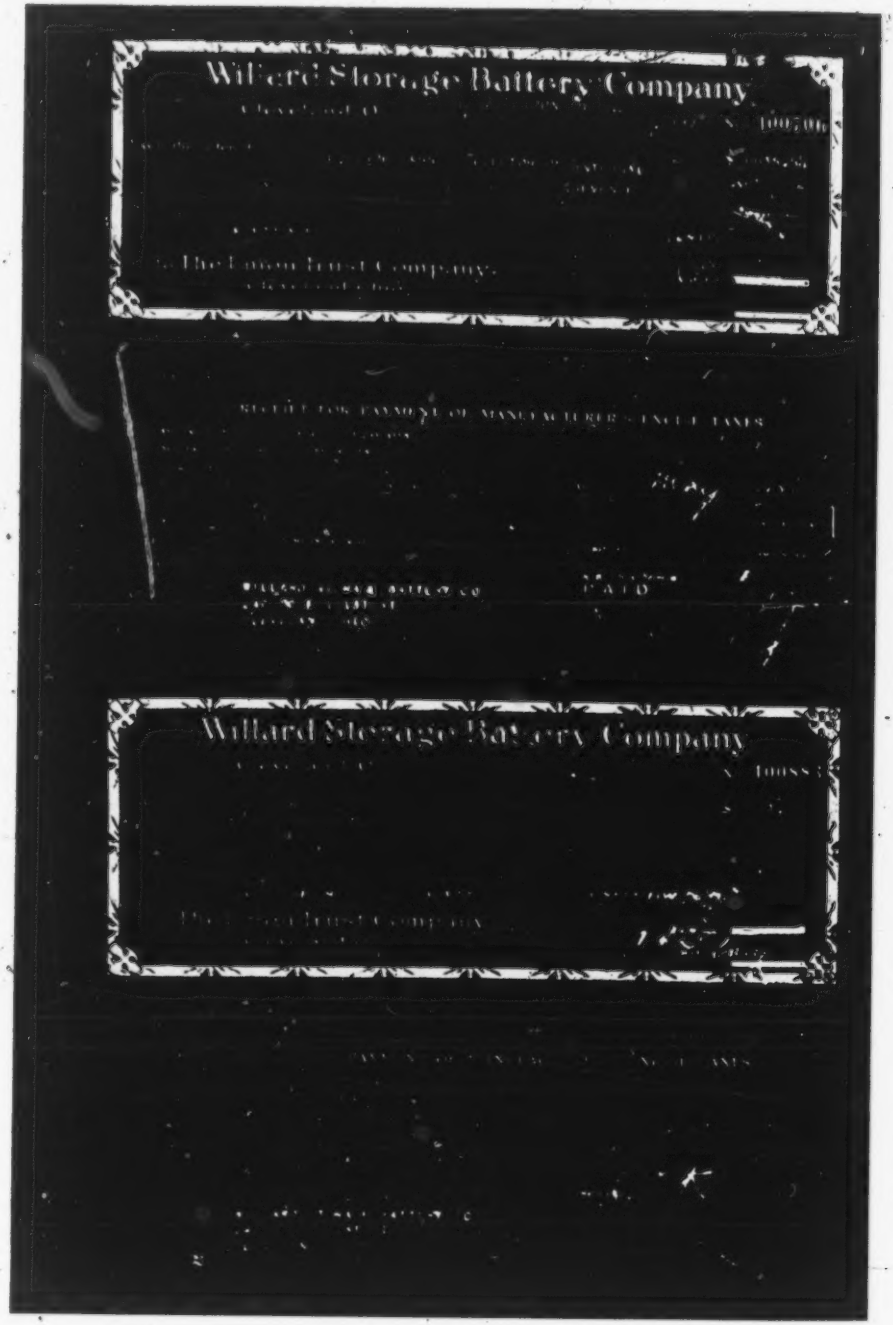
PAID

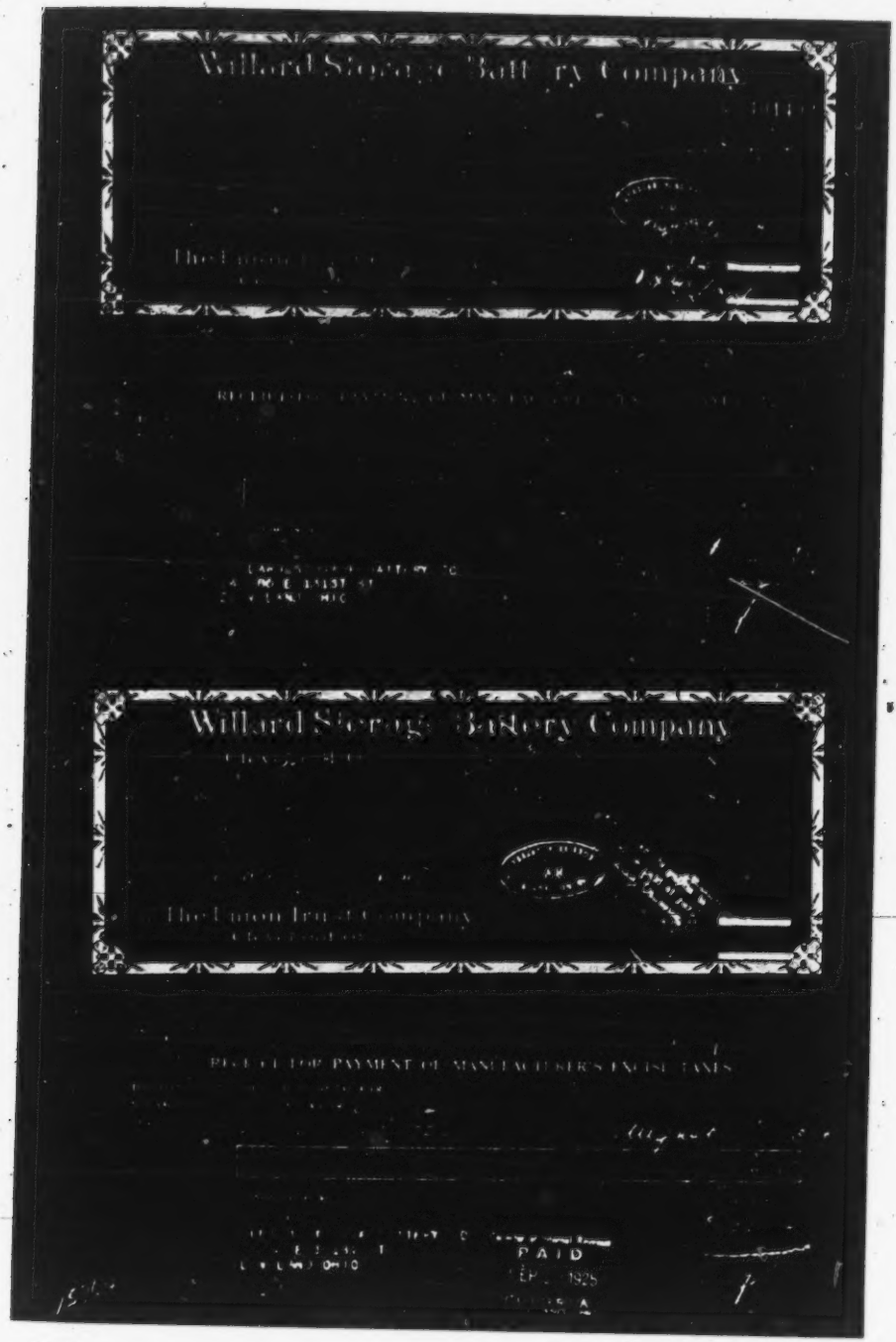
[illegible] 63

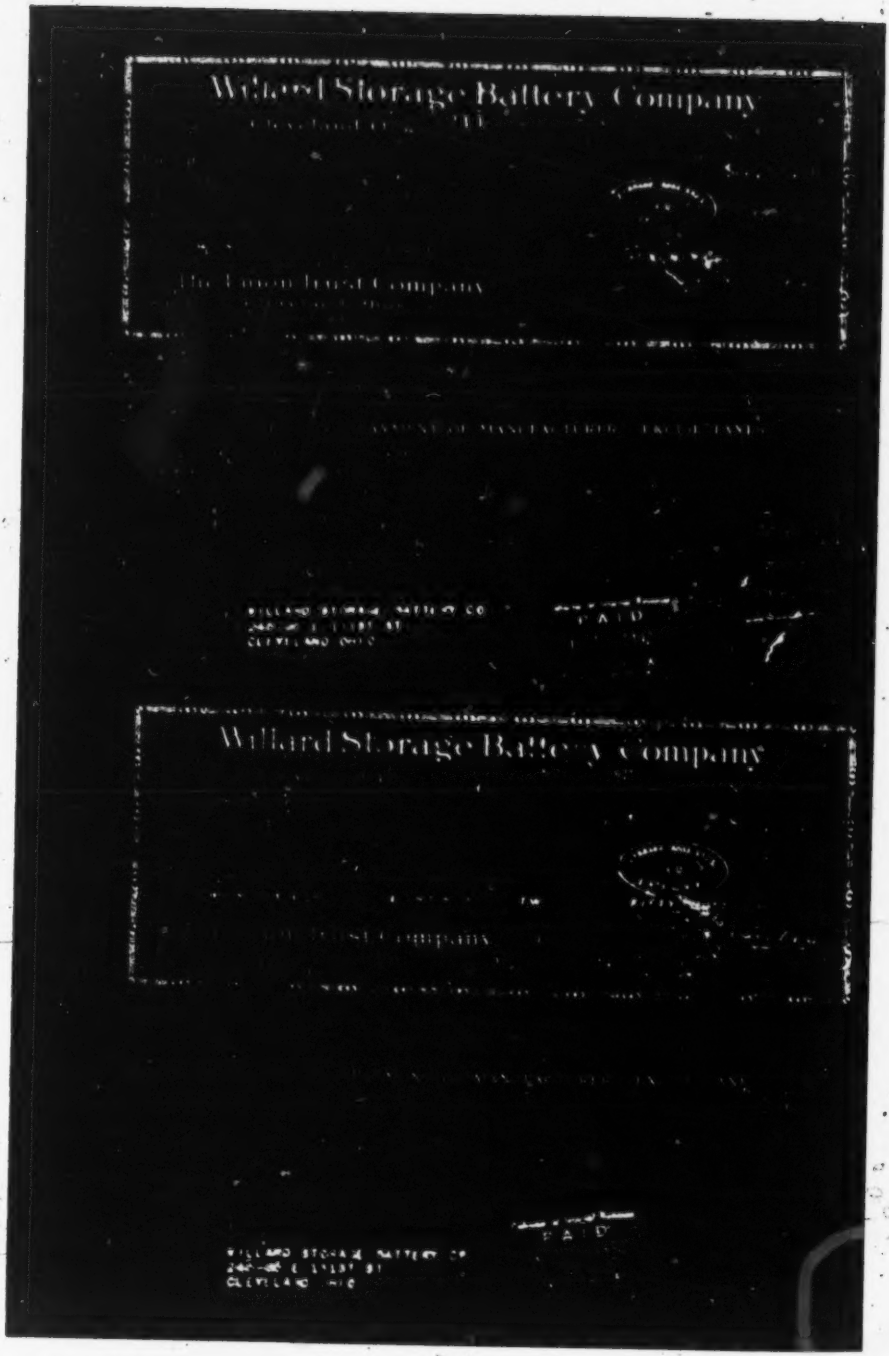
Exhibit C


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Cleveland, O.
Pay to the order of
ELEVEN
to The Union Trust Company
Cleveland
RECEIPT FOR PAYMENT OF MANUFACTURERS EXCISE TAXES
WILLARD STORAGE BATTERY CO
CLEVELAND, OHIO
Willard Storage Battery Company
Cleveland, O.
to The Union Trust Company
Cleveland


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company
The Union Trust Company
PAID


Willard Storage Battery Company
PAID
Willard Storage Battery Company
PAID



Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax cases.

State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative Unit
10/5/26
Stamp here

Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		Period From: January 1st, 1924 To: December 31st, 1925 Year
199	1. Business in which engaged manufacture of electric storage batteries	
	2. Character of assessment of tax, manufacturers' excise tax on batteries	
	(State for or upon what the tax was assessed or the stamps affixed.)	
	3. Amount of assessment	$175,875.19
	4. Reduction of tax liability requested (income and profits tax)	$
	5. Amount to be abated	$
	6. Amount to be refunded (or such greater amount as is legally refundable)	$175,875.19
	7. Dates of payment (see collector's receipts or indorsements of canceled checks	
	(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)	
	8. District in which return (if any) was filed, Cleveland, Ohio.	
	9. District in which unpaid assessment appears	
	10. Amount of overpayment claimed as credit	$
	11. Unpaid assessment against which credit is asked; period from ——— to	$

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal combustion engines, marine, stationary and portable. While they are used very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, threshing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

290 In view of the above facts we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected, and as such should be refunded.

(Attach additional sheets if necessary.)

(Signed) F. J. SMILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PERRIN,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
District
Account number
Date received
Stamp here
Collector of
Internal Revenue

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim except in income-tax cases.

201 State of Ohio, County of Cuyahoga, ss:

Date received by Administrative Unit

Stamp here

Willard Storage Battery Company

(Name of taxpayer or purchaser of stamps.)

Type or print. 216 East 131st Street, Cleveland, Ohio.

(Residence—give street and number as well as city or town and State.)

Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period From January 1st, 1925 To December 31st, 1925 Years
1. Business in which engaged—manufacture of electric storage batteries	
2. Character of assessment or tax—manufacturers' excise tax on batteries (State for or upon what the tax was assessed or the stamps affixed.)	
3. Amount of assessment	$173,934.45
4. Reduction of tax liability requested (income and profits tax)	$
5. Amount to be abated	$
6. Amount to be refunded (or such greater amount as is legally refundable)	$173,934.45
7. Dates of payment (see collector's receipts or indorsements of canceled checks) (If statement covers income tax liability, items 8 to 11, inclusive, must be answered.)	
8. District in which return (if any) was filed	
9. District in which unpaid assessment appears	
10. Amount of overpayment claimed as credit	$
11. Unpaid assessment against which credit is asked; period from ——— to ———	$

202 Deponent verily believes that this application should be allowed for the following reasons:

This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 28th day of October, 1926.

(Title) ---

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 21, 1927.

Address reply to Commissioner of Internal Revenue and refer to MT:M:WED. C1-S-703.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $173,934.45 paid as manufacturer's excise tax on automobile parts and accessories.

You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927,
203 from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

EM

C. R. NASH,
Acting Commissioner.

In United States District Court

Motion to dismiss

Filed July 8, 1929, in no. 15764

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the
204 discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provides an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above entitled case; that such motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June, 1929.

CHARLES C. NORRIS, Jr., and F. C. FRIEND,
Attys. for Plff.

In United States District Court

Answer

Filed April 12, 1930, in no. 15764

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of th defendant herein, by leave of court first obtained, and for answer to plaintiff's petition admits the corporate capacity of the plaintiff herein; admits that defendant is the duly appointed, qualified, and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

205 Defendant admits the allegations contained in numbered paragraphs 1, 2, and 3 of plaintiff's petition.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition including the allegation that all of said sales of electric storage batteries upon which tax was paid were made to persons other than manufacturers of automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 6 of plaintiff's petition including the allegation that said electric storage batteries were commercial commodities and were not specifically designed nor primarily adaptable for use on or in connection with automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant denies the allegations contained in paragraphs 7. 8, and 9 of plaintiff's petition.

Defendant admits the allegation contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of manufacturers' excise taxes collected from plaintiff during the taxable periods beginning January 1, 1925, and ending on December 1, 1925, inclusive, and says that said claim for refund was in the amount of $175,875.19, and that said claim for refund was duly rejected by the Commissioner of Internal Revenue on June 25, 1929. Defendant admits that plaintiff filed with the Commissioner of Internal Revenue an amended claim for refund of manufacturers' excise taxes paid by plaintiff during said taxable periods, and denies that said amended claim for refund was filed on November 3, 1926, but says that said amended claim for refund was filed on October 29, 1926, in the amount of $173,934.45, and that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

206 Defendant denies that said manufacturers' excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $173,934.45 with interest, or any sum whatsoever by reason of payment of manufacturers' excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right of refund of manufacturers' excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921, and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

Copy sent counsel for Pltff. 4-11-30.

W. J. MAHON.

[*Duly sworn to by Wilfred J. Mahon, jurat omitted in printing.*]

207 In United States District Court

Order consolidating case no. 15764 law with cases nos. 15761-2-3-5 law for trial only

Entered May 14, 1931, in no. 15764, by West, Judge

It is ordered that this case be consolidated with cases nos. 15761, 15762, 15763, and 15765 Law for trial only.

In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15764, by West, Judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

208 In United States District Court

Trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15764, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

In United States District Court

Waiver of jury

Filed March 9, 1931, in no. 15764

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

209 In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15764

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to

the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia, with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America, and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States, and plaintiff is a citizen of the United States; the sole owner of the claim hereinafter stated; no action has been had thereon before Congress or any governmental department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1924 to November 1925, inclusive, showing the amount of the tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

210

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec	1924	Jan	1925	21	2	$14,852.63	1/30/25
Jan	1925	Feb	"	21	8	8,363.97	2/28/25
Feb	"	Mar	"	24	7	11,588.18	3/31/25
Mar	"	Apr	"	23	7	12,923.08	4/30/25
Apr	"	May	"	21	6	6,639.61	5/29/25
May	"	June	"	24	8	6,635.54	6/30/25
June	"	July	"	25	7	7,861.95	7/31/25
July	"	Aug	"	21	8	15,760.86	8/31/25
Aug	"	Sept	"	23	3	18,811.15	9/30/25
Sept	"	Oct	"	24	4	22,705.71	10/31/25
Oct	"	Dec	"	1	1	26,802.53	12/1/25
Nov	"	Dec	"	22	1	21,989.24	12/31/25

6. On October 5, 1926, plaintiff filed its claim for refund no. 21166 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods January 1925 to December 1925, inclusive, in the amount of $175,875.19, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its claim for refund no. 703 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods December 1924

to November 1925 in the amount of $173,934.45, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, JR.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector.*
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN, *Asst. U.S. Atty.*
E. F. McMAHON, *Special Atty.*

211 In United States District Court

Order of judgment

Entered October 27, 1931, in no. 15764, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to, on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $173,934.45, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check, to wit:

$14,852.63 from January 30, 1925; $8,363.97 from February 28, 1925; $11,588.18 from March 31, 1925; $11,923.08 from April 30, 1925; $6,639.61 from May 29, 1925; $6,635.54 from June 30, 1925; $7,861.95 from July 31, 1925; $15,760.86 from August 31, 1925; $18,811.15 from September 30, 1925; $22,705.71 from October 31, 1925; $26,802.53 from December 1, 1925; $21,989.24 from December 31, 1925.

It is further ordered that plaintiff recover its costs herein expended, taxed at $----------

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved:

W. J. MAHON, *U.S. Atty.*

212 In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15764

The court having rendered judgment herein in favor of the plaintiff in the amount of $173,934.45, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Petition

Filed May 31, 1929, in no. 15765

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $41,764.57, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

213 1. Prior to December 1, 1925, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about December 1, 1925, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eighteenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the northern district of Ohio, eastern division.

3. Prior to December 1, 1925, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the

manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on December 1, 1925, and ending on February 28, 1926, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles, or motor cycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the defendant made a return in accordance with the provisions of title VI, section 600, of the United States Revenue Act of 1924, of the computation of manufacturer's excise taxes at the rate of two and one half (2½) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the
214 said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of two and one half (2½) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A", and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B", and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in exhibit B, which said sums of money amounted in the aggregate to the sum of $41,764.57, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in exhibit B. All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles, or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than

the automobile truck, automobile wagon, other automobiles and motor cycle industries.

7. The electric storage battery of the kind sold by the plain-
215 tiff during the period between December 1, 1925, and February 28, 1926, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in, or about, the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motor cycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motor boats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, turret lighting and auxiliary power, signalling devices in railroad systems and in military service, searchlights, telephone service, isolated lighting and power plants, street railways, fire-alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1925, and ending on February 28, 1926, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title VI, section 600, of the United States Revenue Act of 1924, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said sales the sum of $41,764.57, as set forth in exhibit B hereunto attached.

216 10. There are attached hereto, marked "Exhibit C" and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to, and upon the demand of the defendant, and represented the payment of the taxes as set forth in the said receipts, and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1926, and ending on March 31, 1926, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F" and made part hereof.

13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in, the sum of $41,764.57, with interest upon each of the payments of the said manufacturer's excise
217 taxes as set forth in exhibit B hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY.
CHARLES C. STONE, JR.,
Philadelphia, Pa.
By F. C. FRIEND,
Its Attorneys.

[*Duly sworn to by C. H. Gibney, jurat omitted in printing.*]

PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $41,764.57 with interest at the rate of 6% per annum as provided by law on $16,793.37 from January 28, 1926; on $14,515.68 from February 25, 1926; on $10,455.52 from March 31, 1926, and costs.

CHARLES C. NORRIS, JR.,
Philadelphia, Pa.
F. C. FRIEND,
Counsel for Plaintiff.

218 *Note re exhibit A*

Printer's note:

This exhibit being identical with exhibit A, attached to petition in case no. 15764, it has been omitted to comply with the rule against duplication (see page 8 of this record).

Exhibit B to petition

Month of sales	Date of payment	Amount of tax paid
1925, December	1926, January 28	$16,793.37
1926, January	February 25	14,515.68
February	March 31	10,455.52
		$41,764.57

221 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department.
Internal Revenue Service, Form 843—Jan., 1922.
Comptroller General U.S., January 18, 1922.

Collector's notation district.
Account number.
Date received.
Stamp here.
Collector of Internal Revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax cases.

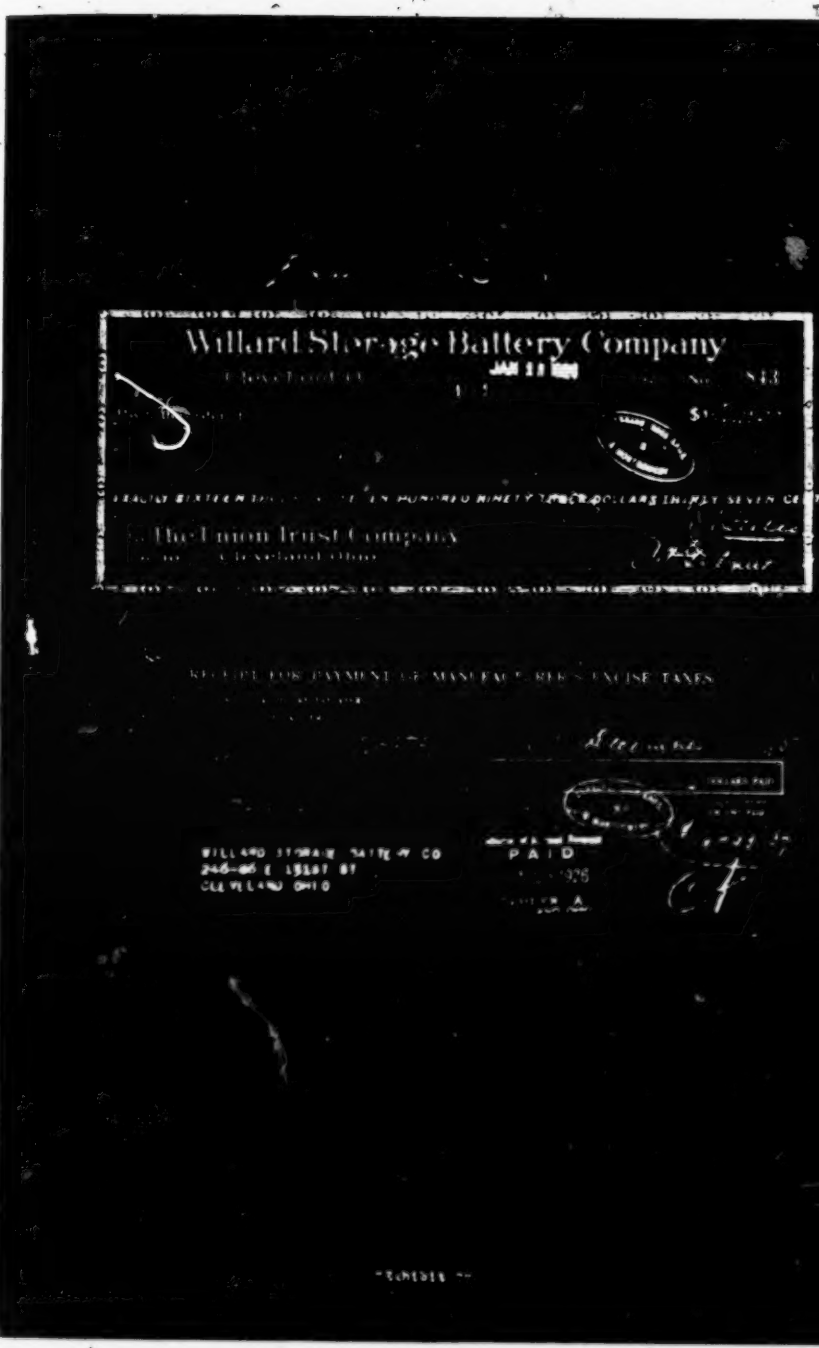
State of Ohio,
County of Cuyahoga, ss:

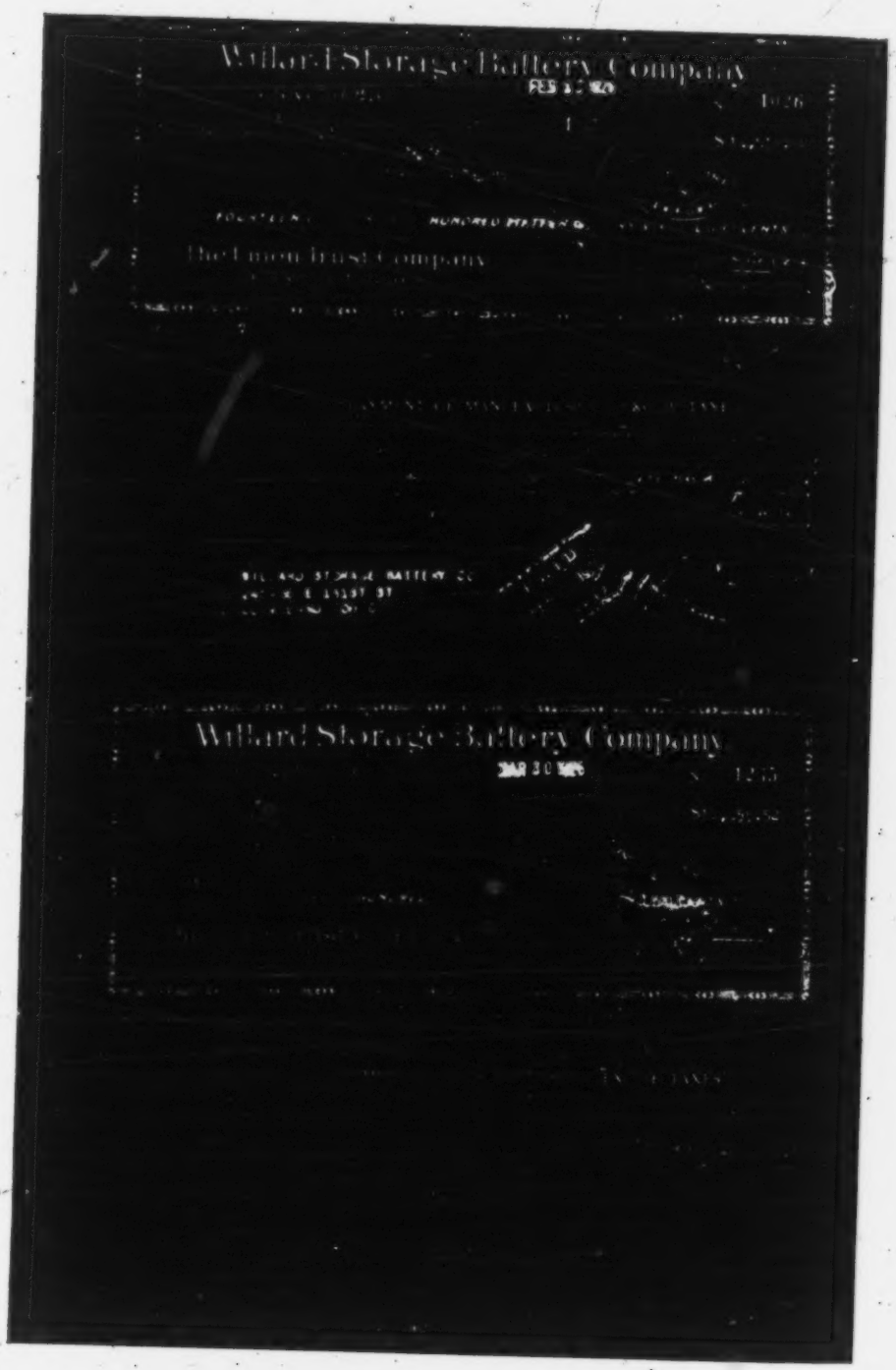
Date received by Administrative Unit 10/5/26.
Stamp here.

Willard Storage Battery Company

Type or Print. (Name of taxpayer or purchaser of stamps).
246 East 131st Street, Cleveland, Ohio.
(Residence—Give street and number as well as city or town and State).
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:


Willard Storage Battery Company
The Union Trust Company
PAID


Willard Storage Battery Company
The Union Trust Company
Willard Storage Battery Company

222

	Period	Year
	From January 1st, 1926 To February 26th, 1926	
1. Business in which engaged manufacture of electric storage batteries.		
2. Character of assessment of tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$24,971.20
4. Reduction of tax liability requested (income and profits tax)		
5. Amount to be abated		
6. Amount to be refunded (or such greater amount as is legally refundable)		24,971.20
7. Dates of payment (see collector's receipts or indorsements of canceled checks)		
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)		
8. District in which return (if any) was filed Cleveland, Ohio.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked; period from ---------- to ----------		

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary and portable. While they are used
223 very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

In view of the above facts we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attach additional sheets if necessary)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 22nd day of September, 1926.

E. L. PETERS,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

(Execute separate form for each tax period)

Treasury Department.
Internal Revenue Service,
Form 843—Jan., 1922.
Comptroller General U.S.,
January 18, 1922.

Collector's notation district.
Account number.
Date received.
Stamp here.
Collector of internal revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

224

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax cases.

Date received by Administrative Unit, _____

Stamp here.

State of Ohio,
County of Cuyahoga, ss:

Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period Year	
	From: January 1st, 1926	
	To: February 26th, 1926	
1. Business in which engaged manufacturer of electric storage batteries.		
2. Character of assessment or tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$41,764.57
4. Reduction of tax liability requested (income and profits tax)		
5. Amount to be abated		
6. Amount to be refunded (or such greater amount as is legally refundable)		41,764.57
7. Dates of payment (see collector's receipts or indorsements of canceled checks)		
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed		
9. District in which unpaid assessment appears		

225 10. Amount of overpayment claimed as credit---------- $----------
11. Unpaid assessment against which credit is asked; period from----------to---------- $----------

Deponent verily believes that this application should be allowed for the following reasons:

This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 28th day of October 1926.

(Title.)

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT.
Office of Commissioner of Internal Revenue.
Washington.

Address reply to Commissioner of Internal Revenue and refer to MT:M:WED C1-S-704.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $41,764.57 paid as manufacturer's excise tax on automobile parts and accessories.

226 You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

C. D. NASH,
Acting Commissioner.

EM

In United States District Court

Motion to dismiss

Filed July 8, 1929, in no. 15765

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's

excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining
227 and action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above entitled case; that said motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June 1929.

CHARLES C. NORRIS, JR., and F. C. FRIEND,
Atty's for Plff.

In United States District Court

Answer

Filed April 12, 1930, in no. 15765

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, by leave of court first obtained, and for answer to plaintiff's petition admits
228 the corporate capacity of the plaintiff herein; admits that defendant is duly appointed, qualified and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

Defendant admits all the allegations contained in numbered paragraphs 1, 2 and 3 of plaintiff's petition.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition including the allegation that all of said sales of electric storage batteries upon which tax was paid, were made to persons other than manufacturers of automobile trucks, automobile wagons, motorcycles and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 6 of plaintiff's petition including the allegation that said electric storage

batteries were commercial commodities and were not specifically designed nor primarily adaptable for use on or in connection with automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant denies the allegations contained in paragraphs 7, 8, and 9 of plaintiff's petition.

Defendant admits the allegations contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of manufacturers excise taxes collected from plaintiff during the taxable peroids January and February 1926, inclusive, and denies that said claim for refund included taxes paid for the period of March 1926. Defendant says that said claim for refund was in the sum of $24,971.20, and that said claim for refund was duly rejected by the Commissioner of Internal Revenue on June 25, 1929. Defendant admits that plaintiff filed with the Commissioner of Internal Revenue an amended claim for refund of manufacturers excise taxes paid by plaintiff during the taxable periods of January and February 1926, inclusive, and denies that said amended claim for refund included the tax-
229 able period of March 1926; that said amended claim for refund was in the sum of $41,764.57 and that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927. Defendant denies that said manufacturers excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $41,764.57 with interest, or any sum whatsoever by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right of refund of manufacturers excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921, and section 600 (3) of the Revenue Act of 1924, in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928, vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed, and that he be allowed to go hence with his costs.

WILFORD J. MAHON,
United States Attorney.

Copy sent to counsel for pltff. 4–11–30.

W. J. MAHON.

[*Duly sworn to by Wilfred J. Mahon; jurat omitted in printing.*]

230 In United States District Court

Order consolidating case nos. 15765 law with cases nos. 15761-2-3-4 law for trial only

Entered May 14, 1931, in no. 15765, by West, Judge

It is ordered that this case be consolidated with cases nos. 15761, 15762, 15763, and 15764 law for trial only.

In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15765

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the eighteenth district of Ohio.

231 3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States, and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any governmental department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1925 to February 1926, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec	1925	Jan	1926	18	1	$16,793.37	1/29/26
Jan	1926	Feb	"	15	7	14,515.68	2/26/26
Feb	"	Apr	"	0	3	10,455.52	4/1/26

6. On October 5, 1926, plaintiff filed its claim for refund, no. 21165, of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods January and February 1926, in the amount of $24,971.20, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its amended claim for refund, no. 704, of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods December 1925 to February 1926, inclusive, in the amount of $41,764.57, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy, or immateriality.

232

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, Jr.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector.*
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN, *Asst. U.S. Atty.*
E. F. McMAHON,
Special Atty.

In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15765, by West, Judge

This day came the parties by their attorney, and a jury having been waived this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

233 In United States District Court

Jury waived; trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15765, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

In United States District Court

Waiver of jury

Filed March 9, 1931, in no. 15765

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

234 In United States District Court

Order of judgment

Entered October 27, 1931, in no. 15765, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $41,764.57, together with interest on the following amounts of taxs paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check, to wit:

$16,793.37 from January 29, 1926.
14,515.68 from February 26, 1926.
10,455.52 from April 1, 1926.

It is further ordered that plaintiff recover its costs herein expended, taxed at $_____.

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved:

W. J. MAHON, *U.S. Atty.*

235 In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15765

The court having rendered judgment herein in favor of the plaintiff in the amount of $11,764.57, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified, and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise, and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Order consolidating cases for appeal

Entered November 7, 1931, in nos. 15761, 15762, 15763, 15764, 15765 by West, Judge

Upon application of the United States attorney, it is hereby ordered, adjudged, and decreed that the above-entitled actions be consolidated for and on appeal under one cover.

Approved:

JOHN B. OSMUN,
Asst. United States Attorney.

236 In United States District Court

Petition for appeal

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant and says that on the 27th day of October 1931 this court entered judgments herein in favor of the plaintiff and against the defendant in which judgments and proceedings of this

cause, certain errors were committed to the prejudice of this defendant, all of which will in detail appear from the assignments of error which is filed with this petition and that by reason thereof, this defendant does hereby appeal from said judgments to the United States Circuit Court of Appeals for the Sixth Circuit.

Wherefore, this defendant prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

W. J. MAHON,
By JOHN B. OSMUN,
United States Attorney, Attorney for the Defendant.

Copy served on Pltff.

J. B. O.

237 In United States District Court

Assignment of errors.

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant, C. F. Routzahn, and having prayed for an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from the judgment of the District Court entered herein on the 27th day of October 1931, files with the accompanying petition for appeal, the following assignment of errors:

1. The court erred in overruling defendant's motion to dismiss plaintiff's petitions.

2. The court erred in overruling defendant's motion for judgment for the following reasons:

A. The provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax paid or collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 in actions instituted subsequent to April 30, 1928.

B. The provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 subsequent to April 30, 1928.

C. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of section 3226 of the Revised Statutes as amended by the provisions of section 1113A of the Revenue Act of 1926.

D. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of section 563 of the Revised Statutes and this court is without jurisdiction to hear and determine such actions.

E. Plaintiff has failed to sustain by the evidence adduced at the trial of these cases, the burden of proof placed on it in these actions.

F. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff
238 during the taxable periods involved, upon which the tax in question was paid, were manufactured and sold as parts or accessories of automobile trucks, automobile wagons, and other automobiles.

G. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff during the taxable periods involved, upon which the tax in question was imposed, were primarily adapted for use in automobile trucks, automobile wagons, and other automobiles."

H. All of the tax in question in these actions, was voluntarily paid to the collector of internal revenue for the eighteenth collection district of Ohio, without protest or duress.

3. The court erred in entering judgment against the defendant and in favor of plaintiff in that the facts found do not support the judgment.

4. The court erred in entering judgment against the defendant and in favor of the plaintiff in that the judgment is not supported by the evidence.

5. The court erred in entering judgment against the defendant and in favor of the plaintiff in that such judgment is contrary to the provisions of section 424 (a) (1) of the Revenue Act of 1928.

6. The court erred in finding and concluding as a conclusion of law number one:

"The articles upon the sale of which the taxes in the foregoing actions no. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in subdivisions (1) and (2) of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and the said taxes were illegally assessed and collected"

in that there is no evidence to support such finding and such conclusion renders the provisions of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

239 7. The court erred in concluding in its conclusion of law number two:

"In case no. 15761 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $89,195.36, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such con-

clusion renders the provisions of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

8. The court erred in concluding in its conclusion of law number three:

"In case no. 15762 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $249,275.32, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

9. The court erred in concluding in its conclusion of law number four:

"In case no. 15763 the plaintiff is entitled to judgment for
240 the amount of taxes illegally collected in the sum of $89,-853.88, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

10. The court erred in concluding in its conclusion of law number five:

"In case no. 15764 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $173,934.45, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act

of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

11. The court erred in concluding in its conclusion of law number six:

"In case no. 15765 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $41,764.57, together with interest upon the amounts of taxes paid from the
241 date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

12. The court erred in refusing to find as a finding of fact as requested by the defendant, number one:

"The use to which an electric storage battery is to be placed determines its design",

in that said finding of fact is supported by the evidence.

13. The court erred in refusing to find as a finding of fact as requested by the defendant, number two:

"Plaintiff has failed to show the specific design of electric storage battery required for each of the uses to which its electric storage batteries were used or placed during each of years 1895 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

14. The court erred in refusing to find as a finding of fact as requested by the defendant, number three:

"Plaintiff has failed to show the specific duty requirements of each of the uses to which its electric storage batteries were used or placed during each of the years 1895 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

15. The court erred in refusing to find as a finding of fact as requested by the defendant, number four:

"Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, automobile wagons, other auto-
242 mobiles, etc., to which its batteries were placed or used during the taxable periods September 1922 to February 1926, inclusive"

in that said finding of fact is supported by the evidence.

16. The court erred in refusing to find as a finding of fact, as requested by the defendant, number five:

"Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, automobile wagons, other automobiles, etc., to which its electric storage batteries were used or placed during the taxable periods September 1922 to February 1926, inclusive",

in that said finding of fact is supported by the evidence.

17. The court erred in refusing to find as a finding of fact as requested by the defendant, number six:

"Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its batteries were placed or used during each of the years 1895 to 1926, inclusive, were of the same design required for use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

18. The court erred in refusing to find as a finding of fact as requested by the defendant, number seven:

"Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its electric storage batteries were placed or used during each of the years 1895 to 1926, inclusive, were the same as the duty requirements of the use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

19. The court erred in refusing to find as a finding of fact as requested by the defendant, number eight:

243 "Plaintiff has failed to show the specific number of each size and type of electric storage battery manufactured and sold by it for each use to which its batteries were placed or used, other than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive",

in that said finding of fact is supported by the evidence.

20. The court erred in refusing to find as a finding of fact as requested by the defendant, number nine:

"Plaintiff has failed to show the specific number of each size and type of electric storage battery manufactured and sold by it and upon the sale of which the taxes in question were imposed, which it manufactured and sold for other uses than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive",

in that said finding of fact is supported by the evidence.

21. The court erred in refusing to find as a finding of fact as requested by the defendant, number ten:

"Plaintiff has failed to show that each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily designed for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles",
in that said finding of fact is supported by the evidence.

22. The court erred in refusing to find as a finding of fact as requested by the defendant, number eleven:

"Plaintiff has failed to show that each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily adapted for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles",
in that said finding of fact is supported by the evidence.

23. The court erred in refusing to find as a finding of fact as requested by the defendant, number twelve:

244 "Plaintiff advertised to the public during the taxable periods in question that numerous designated manufacturers of automobiles and automobile trucks were then using its batteries as original equipment in automobiles and automobile trucks manufactured and sold by such manufacturers",
in that said finding of fact is supported by the evidence.

24. The court erred in refusing to find as a finding of fact as requested by the defendant, number thirteen:

"Plaintiff advertised to its trade, other than manufacturers of automobile trucks and other automobiles, in bulletins and catalogues put out by it during each year 1922 to 1926, that each of the specific sizes and types of its electric storage batteries, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was adapted for use as a replacement battery in some make of practically all makes of automobiles and automobile trucks then manufactured and in use",
in that said finding of fact is supported by the evidence.

25. The court erred in refusing to find as a finding of fact as requested by the defendant, number fourteen:

"The chief use or principal use to which batteries of the specific sizes and types, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was in automobile trucks and other automobiles",
in that said finding of fact is supported by the evidence.

26. The court erred in refusing to find as a finding of fact as requested by the defendant, number fifteen:

"The tax in question, which was paid for the taxable periods September 1922 to February 1926, inclusive, by plaintiff to the defendant, was passed on or collected by plaintiff, directly, or indirectly from its customers and the ultimate consumers",
in that said finding of fact is supported by the evidence.

27. The court erred in refusing to find as a finding of fact as requested by the defendant, number sixteen:

245 "All of the electric storage batteries manufactured and sold by plaintiff, upon which the tax in question was paid for the taxable periods involved, were primarily adapted for use in some make of automobile trucks, automobile wagon, or other automobiles",

in that said finding of fact is supported by the evidence.

28. The court erred in refusing to find as a finding of fact as requested by the defendant, number seventeen:

"Plaintiff advertised to its trade, other than manufacturers of automobile trucks and automobiles, in bulletins put out by it during the taxable periods involved, that the prices quoted included Federal excise tax",

in that said finding of fact is supported by the evidence.

29. The court erred in refusing to find as a conclusion of law as requested by the defendant, number one:

"That the electric storage batteries manufactured and sold by plaintiff during the taxable periods September 1922 to February 1926, inclusive, upon the sale of which the tax in question was imposed, were manufactured and sold as parts or accessories for automobile trucks, automobile wagons, and other automobiles within the meaning of the provisions of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924",

in that such conclusion of law is supported by the evidence.

30. The court erred in refusing to find as a conclusion of law as requested by the defendant, number two:

"That the defendant is entitled to judgment against plaintiff and in favor of defendant, dismissing plaintiff's petitions at plaintiff's costs",

in that such conclusion of law is supported by the evidence.

31. The court erred in refusing to find as a conclusion of law as requested by the defendant, number three:

246 "That plaintiff is not entitled to judgment against de-defendant and in favor of plaintiff in any amount",

in that such conclusion of law is supported by the evidence.

Wherefore, defendant prays that said judgment be reversed and for such other and further relief as may be deemed proper in the premises.

W. J. MAHON,
United States Attorney.

In United States District Court

Order allowing appeal

Entered Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

This day came the defendant, by Wilfred J. Mahon, United States attorney for the northern district of Ohio, and filed herein and presented to the court his petition praying for the allowance of an

appeal intended to be urged by him; praying also that a transcript of record and proceedings and papers upon which judgments herein were rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the appeal.

Copy served on pltff.

J. B. O.

247 [Citation in usual form showing service on Hepburn and Norris et al., filed Nov. 20, 1931, omitted in printing.]

249 In United States District Court

Order of court for withdrawal of exhibits for transmission to U.S. Circuit Court of Appeals

Entered December 14, 1931, nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application of the defendant to transmit the exhibits offered in the above-entitled actions, to the Circuit Court of Appeals as physical exhibits and not to be printed in full in the transcript of record, it is considered by the court to be necessary and proper because of the great volume thereof, that the plaintiff's and defendant's exhibits offered in the trial of the above-entitled actions should be transmitted as original papers and exhibits to the Circuit Court of Appeals.

It is therefore ordered, adjudged, and decreed that all of plaintiff's and defendant's exhibits offered in the trial of the above-entitled actions be withdrawn from the clerk of this court and transmitted by the clerk to the Sixth Circuit Court of Appeals to be inspected in that court upon review without being printed in the transcript of record. Rule 15, paragraph 6, Circuit Court of Appeals.

Approved:

JOHN B. OSMUN,
Asst. United States Attorney.

250 In United States District Court

Stipulation as to record

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

In accordance with section 6 of rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the appellate court, as a true, full, and complete copy of the

original pleadings, papers, and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

HEPBURN and NORRIS,
F. C. FRIEND,
TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
W. J. MAHON and JOHN B. OSMUN,
Attorneys for Defendant.

In United States District Court

Order extending time for filing transcript of record in above-consolidated causes in United States Circuit Court of Appeals

Entered December 16, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above-consolidated causes in the United States Circuit Court of Appeals for the Sixth Circuit be extended from December 18, 1931, to January 25, 1932.

December 1931.

251 In United States District Court

Order extending time for filing transcript of record in above cases in United States Circuit Court of Appeals

Entered January 21, 1932, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above cases in the United States Circuit Court of Appeals for the Sixth Circuit be extended from January 25, 1932, to February 25, 1932.

January, 1932.

In United States District Court

Order extending time for filing transcript of record in United States Circuit Court of Appeals

Entered February 23, 1932, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above consolidated causes in the United States Circuit Court of Appeals for the Sixth Circuit be extended from February 25, 1932, to March 30, 1932,

252 In United States District Court

Order extending time for filing transcript of record in United States Circuit Court of Appeals

Entered March 23, 1932, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above cases, consolidated for appeal, in the United States Circuit Court of Appeals for the Sixth Circuit be extended from March 30, 1932, to April 30, 1932.

March 23, 1932.

In United States District Court

Praecipe for transcript

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled cause, and include therein the following papers and orders in case 15761:

1. Petition filed May 31, 1929.
2. Deft.'s motion to dismiss, filed July 8, 1929.
3. Order overruling Deft.'s motion to dismiss, filed Dec. 16, 1929.
4. Deft.'s exception to order overruling motion to dismiss.
5. Deft.'s answer, filed Apr. 12, 1930.

5a. Journal entries of May 14 and 15, 1931.

6. Stipulation of facts, filed May 14, 1931.

253 7. Waiver of jury, filed Mar. 9, 1931.

7a. Order consolidating cases for trial filed May 14, 1931.

8. Plaintiff's request for findings of fact and conclusions of law, filed May 15, 1931.
9. Deft.'s request for findings of fact and conclusions of law, filed May 15, 1931.
10. Stipulation in re offer of pltf.'s exhibits.
11. Order overruling deft.'s motion for judgment.
12. Deft.'s exception to court's ruling denying deft.'s motion for judgment.
13. Findings of fact and conclusions of law.

13a. Order denying deft.'s request for findings of fact and conclusions of law.

14. Deft.'s exceptions to court's ruling denying defendant's request for findings of fact and conclusions of law.
16. Deft.'s exceptions to findings of fact and conclusions of law.
18. Opinion of court filed Sept. 15, 1931.
19. Order of judgment filed Oct. 27, 1931.

20. Certificate of probable cause filed Oct. 27, 1931.
21. Pltf.'s exhibits 1 to 23, inclusive, withdrawn and transmitted as physical exhibits.
22. Deft.'s exhibits A to X, inclusive, withdrawn and transmitted as physical exhibits.
23. Order consolidating cases for appeal.
24. Petition for appeal.
25. Order allowing appeal.
26. Assignments of error.
27. Citation.
28. Precipe for transcript and printing.
29. Certificate of the clerk.
30. Narrative form bill of exceptions.
31. Orders of court transmitting all exhibits to Court of Appeals.

CASE NO. 15762

1. Petition.
2. Deft.'s motion to dismiss.
3. Answer.
3a. Order consolidating cases for trial.
254 4. Stipulation of facts.
5. Journal entries of May 14 and 15, 1931.
6. Waiver of jury.
7. Order of judgment.
8. Certificate of probable cause.

IN CASE 15763

10. Petition.
11. Deft.'s motion to dismiss.
12. Answer.
12a. Order consolidating cases for trial.
13. Stipulation of facts.
14. Journal entries of May 14 and 15, 1931.
15. Waiver of jury.
16. Order of judgment.
17. Certificate of probable cause.

IN CASE 15764

19. Petition.
20. Motion to dismiss.
21. Answer.
21a. Order consolidating cases for trial.
22. Journal entries of May 14 and 15, 1931.
23. Waiver of jury.
24. Stipulation of facts.
25. Order of judgment.
26. Certificate of probable cause.

IN CASE 15765

28. Petition.
29. Motion to dismiss.
30. Answer.
30a. Order consolidating cases for trial.
31. Stipulation of facts.
31a. Waiver of jury.
32. Order of judgment.
33. Certificate of probable cause.
34. Journal entries of May 14–15, 1931.

W. J. MAHON,
Attorney for Defendant.

Copy served on pltff.

J. B. OSMUN.

255 [Clerk's certificate to foregoing transcript omitted in printing.]

260 In United States District Court, the Northern District of Ohio, Eastern Division

Nos. 15761, 15762, 15763, 15764, 15765

[Title omitted.]

Motion for judgment

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and moves the court for judgment in favor of the defendant and against plaintiff, dismissing plaintiff's petitions on each of the following grounds:

1. The provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax paid or collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 in actions instituted subsequent to April 30, 1928.

2. The provisions of section 424 of Revenue Act of 1928
261 deprive plaintiff of its privilege of instituting and maintaining these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of section 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 subsequent to April 30, 1928.

3. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of Section 3226 of the Revised Statutes as amended by the provisions of section 1113 A of the Revenue Act of 1926.

4. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of section 563 of the Revised Statutes and this court is without jurisdiction to hear and determine such actions.

5. Plaintiff has failed to sustain by the evidence adduced at the trial of these cases, the burden of proof placed on it in these actions.

6. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff during the taxable periods involved, upon which the tax in question was paid, were manufactured and sold as parts or accessories of automobile trucks, automobile wagons and other automobiles.

7. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff during the taxable periods involved, upon which the tax in question was imposed, were primarily adapted for use in automobile trucks, automobile wagons, and other automobiles.

8. All of the tax in question in these actions, was voluntarily paid to the collector of internal revenue for the eighteenth collection district of Ohio, without protest or duress.

Wherefore, defendant prays that plaintiff's petitions be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

262 [Minute entry of argument and submission, Feb. 13, 1933, omitted in printing.]

In United States Circuit Court of Appeals, Sixth Circuit

Judgment

Filed May 9, 1933

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

264 [File endorsement omitted.]

In United States Circuit Court of Appeals, Sixth Circuit

No. 6181

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Appellant

vs.

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, APPELLEE

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division

Opinion filed May 9, 1933

Before HICKS, HICKENLOOPER, and SIMONS, Circuit Judges

SIMONS, Circuit Judge: The suit below was for the recovery of manufacturers' excise tax paid on the manufacture and sale of elec-

tric storage batteries, and collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924. The taxpayer obtained judgment, and the collector appeals.

Two questions are presented: (1) Are the taxpayer's storage batteries "parts and accessories" of automotive vehicles within the meaning of the applicable statutes and the regulations of the Commissioner of Internal Revenue; (2) does section 424 of the Revenue Act of 1928 deprive the United States courts, in a suit against the collector, of jurisdiction to determine whether the taxes here involved were erroneously and illegally assessed and collected, and vest the determination of such question exclusively in the Commissioner?

265 Section 900 of the 1921 act is printed in the margin.[1] So far as the issues in this case are involved, section 600 of the 1924 act is the same, and both are identical with the corresponding section of the Revenue Act of 1918, which was the first act imposing the excise tax here in question. Section 900 has been construed by the Supreme Court in Universal Battery Co. v. United States, 281 U.S. 580, to the effect that subdivisions 1 and 2 thereof, with the introductory provision, contemplate that parts and accessories may be sold along with the vehicle by the manufacturer of the latter, and where this is done the tax is to be paid by the manufacturer of the vehicle. Subdivision 3, with the introductory provision, contemplates that parts and accessories may be sold separately from the vehicle by the manufacturer of the former to others than a manufacturer of the latter, and the tax on such sales is to be paid by the manufacturer of the parts and accessories. We are here concerned only with taxes assessed and collected upon sales by the taxpayer to others than the manufacturers of automotive vehicles, since sales by the taxpayer to such manufacturers are tax free, and it is only resale by the latter that is taxed.

The administrative regulations issued under section 900 have construed the term "parts" therein as meaning any articles designed or manufactured for the special purpose of being used as, or to replace, component parts of such vehicle, and which by reason of some characteristic are not such commercial articles as ordinarily would be sold for general use, but are primarily adapted for use as component parts of such vehicle. They have also construed the term "accessories" as meaning any articles designed to be used in connection with such vehicle to add to its utility or ornamentation, and

[1] That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivisions (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivisions (1) or (2), 5 per centum;

which are primarily adapted for such use whether or not essential to the operation of the vehicle. In the Universal Battery case, supra, the court held such construction to be admissible, saying,

266 "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would also be unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. Magone v. Wiederer, 159 U.S. 555, 559. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted."

Of vital significance is the application made by the Supreme Court of its rule of construction to the issues involved in the five cases disposed of by its single opinion in the above case. In no. 127 the District Court found that the storage batteries there involved had been for several years used in motor vehicles, but made no finding as to whether they were primarily adapted for such use, or were equally adapted for other uses. This was a material issue. The case was reversed, and remanded for complete findings. In no. 275, storage batteries were likewise involved. The District Court made a special finding that they were of a type specially suitable for use on automobiles as replacements, and were not adapted to any other primary purpose or use. Judgment was affirmed. In no. 350 the tax was on sales of gascolaters, devices used on internal combustion engines to strain dirt, water, and foreign matter from the gasoline. The petition alleges that such devices were not parts or accessories of motor vehicles, but commercial articles sold for general use. This was a material issue, to which the findings made no definite response. Judgment was reversed, and the case remanded for complete findings. In no. 351 the tax was on replacement parts for speedometers. It was conceded that speedometers are accessories. It was found by the District Court that the parts were specially designed, manufactured, and sold for use on automobiles, and were not adapted to any other purpose or use. Judgment was affirmed. In no. 352 the tax was laid on brackets and fittings for automobile bumpers. They were designed, manufactured, and sold for such use, and were not adapted for any other. The judgment was affirmed.

In the light of the construction placed upon the statutes and regulations by the Supreme Court, and the manner of its appli-

267 cation to specific issues involved, we come to the consideration of the instant case. The district judge found that the taxpayer and its predecessors had been in the business of manufacturing storage batteries since 1896; that its batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses; that the first of its storage

batteries that were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for other purposes; that the automobile manufacturer adjusted the space in his automobile to fit the storage battery; that the storage battery was not designed especially for use on the automobile; that the parts of the storage batteries upon which the taxes in suit were paid were much the same as the parts of batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, and that the only changes were those naturally due to refinement in the art of manufacture, and to competition in price; that none of these refinements made the batteries peculiarly adaptable for use only on automobiles, but that they continued to be equally adaptable for other uses where the duty requirements were the same; that the batteries manufactured by the taxpayer, and upon which the taxes in suit were paid, were commercial commodities which were commonly, generally and widely manufactured and sold for a great many different purposes; that there were no peculiar characteristics of such batteries which rendered them not such commercial articles as would ordinarily be sold for general use for a great many different purposes; that the uses of such electric batteries other than their use on automobiles were not incidental to their use on automobiles; that they were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radios, and for a great many other purposes where the duty required was the same, and that they were so used; that they were not primarily adaptable for use only on automobiles, but were interchangeable for use in connection with automobiles, and with many other devices; that they were designed for use in all fields in which electricity in portable form was requred; that the duty requirement for use in automobiles was also required in various other uses, and that the batteries which were applied to these other uses were identical in design with the batteries used in connection with automobiles, and that such batteries were just as applicable for one use as for another where the duty requirement was the same.

268 Having found the facts as recited, the district judge came to the legal conclusion that the articles upon the sale of which taxes here involved were collected, are not parts or accessories of automotive vehicles within section 900 of the 1921 act, or section 600 of the 1924 act, and that the taxes were illegally assessed and collected. There remains for us only the inquiry as to whether the evidence supports the findings, and the findings the judgment. United States v. United States Fidelity Co., 236 U.S. 512, 527; Dooley v. Pease, 180 U.S. 126; Philadelphia & Reading Co. v. United States, 247 Fed. 466 (C.C.A. 3).

In support of its contention that storage batteries of the type here involved were in wide commercial use prior to the development of the automobile, that they were not designed primarily for

use in automotive vehicles, and that they are today widely sold for a great variety of uses to which they are as well adapted as to use in automobiles, the taxpayer marshaled a great wealth of evidence. In answer the collector produced none. He relies solely upon responses drawn from the taxpayer's witnesses, and on the inferences to be drawn therefrom. It would be idle for this court to attempt an analysis of the evidence presented by the somewhat substantial record. It is sufficient to say that we have given it careful consideration, and that it sustains the findings of the district judge.

It may be important, however, to note that while storage batteries had a somewhat wide use as early as 1880, their modern development began about 1893, when they were in use for train lighting, traction batteries, and railway signals. Later they came into use for carriage lighting, telephone, telegraph, and ignition in gas engines. In 1908 they began to be used for automobile lighting, but it was not until 1911 that Dr. Kettering applied the storage battery to the automobile for the combined purpose of starting, lighting, and ignition, and it is significant that he selected a standard battery in use for railway signal work for that purpose. It is also important to note that the catalogue of Willard storage batteries issued by Sipe and Sigler, the taxpayer's predecessors, in 1901, listed a great many uses for their commercial batteries other than for use in connection with automobiles. Likewise, the testimony shows that storage batteries equally applicable to automobiles, and upon which the taxes in suit were paid, were used from 1922 until 1926, the taxable period here involved, for some eighty or more different purposes, each unconnected or unrelated to use on automobiles. It
269 seems to us no answer to this evidence to say that a battery of the size and power to meet the requirements of a given automobile is primarily adapted for use with such automobile when the evidence is so conclusive that the size and type of battery furnished to purchasers is determined not by the manner or place of use, but by its duty requirements.

Giving due consideration to the rule that the burden is on the taxpayer to prove all of the facts establishing the invalidity of the tax, United States v. Anderson, 269 U.S. 422; Metcalf and Eddy v. Mitchel, 269 U.S. 514; Wickwire v. Reinecke, 275 U.S. 101, we are of the opinion that the findings of the District Court are in response to the evidence, and we agree with its conclusion that the taxpayer's product, upon the sales of which the disputed taxes were assessed and collected, are not automobile parts and accessories within the meaning of the applicable statutes and regulations. We thus find ourselves in accord with the majority of the Court of Appeals for the Third Circuit upon identical issues in Blakely D. McCaughn, Collector v. Electric Storage Battery Co., — Fed. (2d) —, decided January 31st, 1933. We find nothing in the opinion of the Court of the Second Circuit in Robert O. Eaton, Collector v. American Chain Co., — Fed. (2d) —, decided March 7, 1933, to persuade us otherwise. The articles on which alleged erroneous taxes were as-

sessed in the latter case were "weed chains." There was no showing that the specific chains sold, and for which the tax was imposed, were designed and primarily adapted for any other specific use than that on automobiles. Moreover, the development of tire chains followed the development and general use of the automobile, and was in response to a need presented by it. Finally, "weed chains" are articles covered by United States patent, and the patent clearly specifies them as primarily useful on automobiles to prevent skidding. It may well have been thought that the description and specification of the patent, without more, are conclusive on the question of their primary adaptability. See also Philadelphia Storage Battery Co. v. Lederer, 21 Fed. (2d) 320 (D.C.); General Lead Battery Co. v. United States, 60 Fed. (2d) 177 (Ct. of Cl.).

We come then to the second question to be decided. Is recovery barred by section 424 of the Revenue Act of 1928, printed in
270 the margin?[2] The collector's contention is that this section ousts the jurisdiction of the court to determine whether taxes have been illegally assessed and collected in a suit not begun prior to April 30, 1928, and vests such jurisdiction exclusively in the Commissioner of Internal Revenue. It has long been established that taxpayers have a common law right recognized by statute to sue the Collector in a court of the United States for the recovery of taxes wrongfully collected. This is conceded by the Collector. Such actions are personal in their nature, equitable in character, and are as for money had and received. Duffin v. Lucas, 55 Fed. (2d) 786, 792 (C.C.A. 6); Sage v. United States, 250 U.S. 33, 37. When the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the court in the case. Smietanka v. Indiana Steel Co., 257 U.S. 1, 5. It is true that in this instance the certificate has been made, but the intended scope of the action, as in the Smietanka case, must be judged by its possibilities under the statutes that deal with it. To give effect to the Collector's contention would be to hold that section 424 not only repeals as to suits for recovery of such taxes as are here involved, begun after April 30, 1928, all of the statutes which recognize the taxpayer's right to sue the collector, but destroys the right itself. If such were the intention of the Congress, it has fallen far short of expressing it. Section 424 deals not with rights of action, but with limitations upon the power of the Commissioner to make refunds. Its provisions are not in conflict with the general

[2] No refund shall be made of any amount . . . collected from any manufacturer (of parts for automobiles) . . . unless either
(1) pursuant to a judgment of the Court in an action duly begun prior to April 30, 1928; or
(2) it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee was returned to him; or
(3) the Commissioner certifies to the proper disbursing officer that such manufacturer . . . has filed . . . a bond . . . conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, . . . within six months after the date of the payment of the refund to the persons who purchased . . . the articles in respect of which the refund is made. . . .

provisions of law authorizing suits for refund of taxes. Boyle Valve Co. v. United States, 38 Fed. (2d) 135, (Ct. of Cl.); American Chain Co. v. Eaton, 58 Fed. (2d) 248 (D.C.), reversed on other grounds in Eaton, Collector v. American Chain Co., supra; Electric Storage Battery Co. v. McCaughn, 52 Fed. (2d) 205 (D.C.), affirmed by McCaughn, Collector v. Electric Storage Battery Co., supra.

We agree with the authorities above cited, not only in reliance upon familiar principles governing repeal by implication, but also because the section appears to us to have an obvious literal meaning perfectly applicable to refunds by the Commissioner after judicial determination of the legality of the tax.

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Article 1255, Regulations of the Treasury No. 74 (1928), provides for the filing of claims for refund in cases where judgment is obtained against the collector. To such claims must be annexed inter alia a certified copy of the final judgment and a certificate of probable cause. They must not be confounded with claims for refund under section 3226, R.S., as a prerequisite to the bringing of suit either in the Court of Claims against the United States, or in the District Court against the collector. Until claim for refund under regulation 74 is made there is no occasion for administrative decision thereunder. When, however, final administrative determination is invoked, the mandate of section 424 forbids the refund unless the taxpayer can bring himself within the provisions of paragraphs 1, 2, or 3. If the claim for refund is made pursuant to a judgment of the court in an action begun prior to April 30, 1928, the Commissioner is not forbidden to refund under the applicable statute, and this may well be without qualification, although this we are not required to decide. Failing to bring himself within the condition of paragraph 1, because of not having pursued his claim to judgment in an action begun prior to the critical date, the taxpayer must (2) establish to the satisfaction of the Commissioner (a) that the amount claimed was in excess of the amount properly payable upon the sale of the article subject to tax, (b) that such amount was not collected directly or indirectly from the purchasers, or (c), that such amount, although collected from the purchasers, was returned to them. Failing in bringing himself within the provisions of paragraph 2, the taxpayer must under paragraph 3 file a bond conditioned upon his repayment to the purchasers such amount of the tax as has not been distributed, and secure certification by the Commissioner to the proper disbursing officer that such bond has been filed. Whether or not there can be judicial review of decisions by the Commissioner in the event that he acts arbitrarily or through caprice, we are not in this case called upon to decide. Reading the section literally, however, with the alternative provisions of its several paragraphs in mind, the purpose of the Congress to prevent the manufacturer from enriching himself by recovery of a tax that he has himself not paid but has passed on to the consumer, appears in bold relief. It is also

clear from the legislative record of the section. It follows from what we have said that the judgment of the court below must be affirmed.

So ordered.

272 [Clerk's certificate to foregoing transcript omitted in printing.]

273 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

274 File no. 37,932. U.S. Circuit Court of Appeals, Sixth Circuit. Term no. 329. C. F. Routzahn, Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, petitioner, vs. Willard Storage Battery Company. Petition for a writ of certiorari and exhibit thereto. Filed August 9, 1933. File no. 329 O.T. 1933.

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